

***'CORPORATE CRIMINAL LIABILITY AND  
SCOTS LAW- THE LESSONS OF ANGLO-  
AMERICAN JURISPRUDENCE'***

*A thesis submitted in satisfaction of the Degree of Doctor of  
Philosophy*

*submitted by*

***RICHARD MAYS***

Faculty of Law,  
University of Edinburgh,  
Old College,  
Edinburgh

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## DECLARATION

***'Corporate Criminal Liability and Scots Law- The Lessons of Anglo-American Jurisprudence'***

I hereby certify that other than the assistance I acknowledge in the accompanying preface, this thesis has been composed by me and that the work it contains represents my own efforts.

20th March 1998



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## ABSTRACT

*My thesis is a relatively straight forward one. It is that the jurisprudence on the topic of corporate criminal liability is underdeveloped in Scotland and that there are many lessons to be learnt from the common law jurisdictions in the promulgation of any future comprehensive, bespoke legal framework adopted in Scotland. Drawing from literature from the Anglo-American systems, I have sought to offer a comprehensive treatment of the subject and how it might be applied in a Scottish context. At the same time, I have analysed the available jurisprudence both in Scotland and elsewhere in an effort to identify all the relevant issues which require to be addressed in developing a new Scottish framework. Corporate crime, as the student all too readily becomes aware, is a complex subject. It is not just about corporations and criminal law. A deeper understanding of other issues is required to appreciate the intricacies and complexities of a subject which is attracting ever increasing attention. It is my hope that this thesis is testimony both to the breadth of the subject and my efforts to master it. Indeed my opening chapter attempts to tease out the diffuse preliminary issues which one confronts in addressing the subject. It is difficult to know where to start. Does one start with the components of the subject- corporations or criminal law or, does one explain the nature of the subject of corporate crime ? I have attempted to bring together what I believe are crucial preliminaries. Chapter 2 is altogether more unitary seeking to analyse the basis of attribution of criminal liability to the corporation. The movement from atomistic conceptions of liability to a holistic basis is discussed and indeed supported. In chapter 3 I seek to cover one of the major controversies of corporate criminal liability- the perceived dichotomy of individualism and collectivism. There are many who believe that criminal liability is uniquely personal and as such corporations should not attract criminal liability. However, in my thesis I lend support to those writers who argue for a pluralist approach of criminalising corporations and/or individuals operating within in them depending on the given circumstances. Chapter 4 attempts to draw from the large body of penological literature and in the process discusses both the nature and variety of methods of punishing the corporation. Most of these ideas have not been tried in a Scottish or British context. Hopefully, I convince the reader that punishment of the corporate criminal can, and should, be achieved beyond the limitations of the fine. Chapter 5 may stand out to those who read this thesis. It is perhaps the only chapter which deals with the specific species of criminal offence- homicide. My justification for including this topic is not that it is the most severe of crimes, or the gravest of issues but, rather that the literature is both rich and more importantly, it is the resurgent interest in corporate homicide that has fuelled much of both public and academic interest in the topic of corporate crime generally. The literature in both England and America hopefully presage any debate that may occur in Scotland. Finally, in chapter 6 I seek to draw all of these issues together and offer my own perspective on how corporate criminal liability may operate in a Scottish context. Scotland is a small nation proud of its culture, its people, and its legal system. Sometimes, particularly in respect of the legal system, that pride is misplaced. Our system has contributed much and has much still to contribute to the global legal environment. By the same token, we have much to learn. The subject of corporate criminal liability is but one example. The lessons from the Anglo-American jurisprudence are many. I hope that when the time presents itself to develop a fulsome framework for the criminal liability of corporations in Scotland those lessons will be learned. This thesis represents a preliminary attempt at identifying what those lessons are and how they may be applied in Scotland.*

## PREFACE

Received wisdom has it that one writes the preface and the introduction to any work after one has completed the main body. One is able to offer an appropriate rationale from a reflective and knowledgeable perspective. The difficulty in attempting such a task in respect of an attenuated piece of work such as this, is that one readily forgets why one embarked on the project in the first place. 'Why', after a while, appeared to me, to become of somewhat lesser importance and all too readily, has been supplanted with a simple determination to see it through. Whether my own experience of writing a Ph.D. thesis is unique I will leave to others to assess.

I embarked on this course of study having just completed a Masters degree in Commercial Law. The progression to Ph.D. studies seemed a logical one, as did the choice of topic. I was interested in companies and company law. I harboured misgiving about corporations' role and power within modern society and, in truth I harboured fascination about their significance in the creation of wealth. In the 1990s interest in the topic of corporate crime was beginning to stir. Those stirrings were in the common law jurisdictions; the academic writings in Scottish journals were minimal and as I was to find out the Scottish jurisprudence generally on this topic is extremely limited. This only encouraged my fascination. I was interested in developing a field of study that was relatively untouched in Scots law. My thesis attempts to illustrate the poverty of Scottish jurisprudence on this topic and to offer, if not a blueprint for the future, certainly an insight into how Scots law may treat the subject henceforth and at the same time identify the issues that require to be addressed by those developing a framework of corporate criminal liability. The choice of topic offered an opportunity to blend my interest in company law and criminal law. The benefit of hindsight has at least disabused me of the notion that corporate crime is an issue pertaining simply to the interface between company law and criminal law. The years of study have taken me into hitherto unexplored areas (for me at least) of organisational behaviour, criminology, penology and organisational structure and theory. I set out with one 10 page article on the topic of corporate criminal liability and ended up with a room filled with box files.

Although this thesis represents my own thoughts and work, it would be unfair of me not to acknowledge the assistance given by various people throughout its development. First, I would like to thank my supervisor, Professor McCall-Smith, who spend the early years of study chasing after me and doubtless wondering if I would ever submit anything worthwhile, and then the last 18 months inundated with drafts, e-mails messages, letters, and requests for meetings. His supervision, geniality, bonhomie, general confidence building, and constructive criticisms are undoubted factors in my eventual submission of this thesis. I would also like to thank my colleagues at the Robert Gordon University, Aberdeen for their tolerance of my long periods of isolation (they would call it absenteeism) as I worked on this thesis, the institution itself for funding 50% of my fees, and Vicki and Linda and the library staff for gathering in my horrendous number of inter library loans and Lisa, for helping with the presentation. Working in an academic institution offered me great advantages over other part-time candidates and without the support of my employer and my colleagues I could never have hoped to complete. I think it also appropriate to thank my wife, Elaine, for her forbearance. Hers was a role reversal from that of Professor McCall- Smith. In the first few years, if she wanted me out the way, she would utilise the immortal line of ‘ just how is that thesis coming along ?’ Guilt often forced me into the study. In the last 18 months she has been all but ‘widowed’ as I confined myself to the computer while she assumed more than her fair share of domesticity. My sole companion throughout this period was our dog, Sweep, who in glowing testimony to the quality of the offering, slept through every word.

I have said very little of the thesis itself leaving that to the abstract. I hope I have developed a reasonably comprehensive and coherent study of the topic. My research took me into the four corners of the globe and with the support of my workplace library I was able to lay my hands on nearly every article of significance written in English on the subject of corporate crime. Corporate criminal liability is a fascinating subject. It has prompted enormous discussion in the Anglo-American jurisdictions and very little in Scotland. It is time for that to change. I hope this thesis will stimulate interest, offer some solutions and, perhaps prompt some debate on how Scotland should address the subject of corporate criminal liability. I have laid the text

out in Green's house style as one hopefully accepted as in common usage and I have attempted to state the law as at 1st January 1998.

*Richard Mays*



## CHAPTER 1

# CORPORATIONS, CRIME, AND CORPORATE CRIMINAL LIABILITY

### 1.0 Introduction

Once described as 'a curiously neglected area of scholarship'<sup>1</sup>, interest in the topic of corporate crime continues to grow.<sup>2</sup> This interest is taking place against a changing social, political and economic landscape.<sup>3</sup> Increasingly, attention has been turning away from a myopic focus on 'street crime' towards white collar crime generally and corporate crime in particular.<sup>4</sup> This realignment of public and jurisprudential focus is fuelled in part by liberal consensualism<sup>5</sup> and in some part by the pursuit of intellectualism.<sup>6</sup> However, it would be wrong to view interest in the topic as purely academic. There is strong evidence of the public, the media, prosecutors as well as academic lawyers exhibiting interest in the subject.<sup>7</sup> Whilst

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<sup>1</sup> L. Orland, *Reflections On Corporate Crime: Law In Search Of Theory And Scholarship* 1980 17 American Journal of Criminal Law 21-31.

<sup>2</sup> R. Kramer, 'Corporate Criminality: The Development Of An Idea' in *Corporations As Criminals*, (Hochstedler Ed., 1984) at p. 13.

<sup>3</sup> L. Dunford and A. Riley, *Corporate Manslaughter- Time For Reform?* Paper presented at SLSA conference Southampton (1996), p. 1; F. T. Cullen, Maakestad and Cavender, *Corporate Crime Under Attack: The Ford Pinto Case And Beyond*, (1987) at p. 310

<sup>4</sup> L. H. Leigh, 'The Criminal Liability Of Corporations And Other Groups: A Comparative View', 1982 80 Michigan Law Review 1508 - 1529 at p. 1508; Cullen et al., n. 3 at p. 5; see also Katz 'The Social Movement Against White Collar Crime' in Egozin Bittner and Sheldon Messinger (Eds.) *Criminology Review Year Book* vol. 2 1980 162.

<sup>5</sup> 'Justice must be blind to rank, power and position' President Carter LA Bar Assoc. address 4/5/78. 'The failure to confront the societal problem presented by corporate crime presents a double standard in law enforcement' J. R. Elkins, 'Corporations And The Criminal Law: An Uneasy Alliance', 1976 65 Kentucky Law Journal 73-129 at p. 77; Wells, 'Corporations: Culture, Risk And Criminal Liability', 1993 Criminal L. R. 551-566 at p. 566; Braithwaite, *Corporate Crime In The Pharmaceutical Industry*, (1984), at p. 305. In *New York Central RR v United States* 212 US 481 (1909) the Supreme court said 'We see no valid objection in law, and every reason in public policy why a corporation which profits by the transactions...shall be held punishable... While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted by these bodies, and particularly that interstate commerce is almost entirely in their hands, and, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectively controlling the subject matter and correcting the abuses aimed at.'; G. Gordon, *Criminal Law*, (2nd Ed., 1978) at p. 284; A. Chayes in, *The Corporation In Modern Society*, (1961, E. Mason Ed.) at p. 31

<sup>6</sup> Kramer, n. 2 at p. 13-4 argues that academics were responsible for the upsurge in public interest in the topic in America in the 1980s; see also Coffee, 'Beyond The Shut-Eyed Sentry: Toward A Theoretical View Of Corporate Misconduct And An Effective Legal Response', 1977 63 Virginia Law Review 1099 at p. 1110.

<sup>7</sup> See M. Clinard and P. Yeager, *Corporate Crime*, (1980), at p. 301

accepting that scholarship is often subject to vogue,<sup>8</sup> the intellectual idiosyncrasies of corporate crime are undoubtedly contributing to the sustained interest;<sup>9</sup> the literature is replete with many conflicting ideas and theories.<sup>10</sup> Notwithstanding significant problems, the heightened interest offers considerable optimism that workable solutions to many of the key issues identified by academic commentators can be found.<sup>11</sup>

It is a self-evident truth that corporations are the dominant force in modern commercial life. It is equally clear a great deal of crime is committed in the context of corporate bodies.<sup>12</sup> However, it is not only the known extent, but also the perceived potential, of the problem which causes concern about corporate criminality. Put simply, using the corporate form to engage in criminal activity 'poses an awesome risk of escalating breakdown of social control.'<sup>13</sup> Corporate crime is no new phenomenon; for as long as corporations have existed individuals have used the corporate form to achieve illegal ends.<sup>14</sup> Despite this, there is evidence to suggest that courts have prevaricated<sup>15</sup> in tackling what is admittedly a difficult issue.<sup>16</sup> In fairness, it must also be conceded that historically courts of all jurisdictions, in addressing corporate criminal liability, were having to deal with economic and environmental phenomena previously not encountered.<sup>17</sup> Gobert in

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<sup>8</sup> Stone, 'Corporate Vices And Corporate Virtues: Do Public/Private Distinctions Matter?', 1982 130 University of Pennsylvania L. R. 1441-1509 at p. 1441.

<sup>9</sup> Andrews, 'Reform In The Law Of Corporate Liability' 1973 Criminal L. R. 91-97 at p. 91 claims that the subject abounds with irrationality; Sullivan, 'Expressing Corporate Guilt' 1995 15 Oxford Journal of Legal Studies 281-293 at p. 293 argues that corporate criminal liability is an 'area replete with daunting problems of analysis and policy.'

<sup>10</sup> L. Snider, 'The Regulatory Dance: Understanding Reform Process In Corporate Crime' 1991 19 International Journal of Sociology and the Law 209-236 at p. 217.

<sup>11</sup> Kramer, n. 2 at p. 14.

<sup>12</sup> McCall-Smith and Sheldon, *Scots Criminal Law (1992) chap 4*; M. Clinard and P. Yeager, n. 7 at p. 301; see also Gruner, *Corporate Crime And Sentencing (1994)* at p. 7

<sup>13</sup> Fisse and Braithwaite 'Accountability And The Control Of Corporate Crime: Making The Buck Stop' in Findlay and Hogg, *Understanding Crime and Criminal Justice (1988)*, at p. 96.

<sup>14</sup> Op cit. J. S. Coleman, 'Is Corporate Criminal Liability Really Necessary?', 1975-79 29 South Western Law Journal 908.

<sup>15</sup> D. S. Anderson, 'Corporate Homicide: The Stark Realities of Artificial Beings and Legal Fictions', 1981 8 Pepperdine Law Review 367-417 at p. 384.

<sup>16</sup> M. Clinard, 'Illegal Corporate Behaviour', October 1979, US Dept. of Justice at p. 15; Heerey 'Corporate Criminal Liability- A Reappraisal' 1962 1 University of Tasmania L. R. 677-684 at p. 677.

<sup>17</sup> G. Stessons, 'Corporate Criminal Liability: A Comparative Perspective' 1994 International and Comparative Law Quarterly 493-520 at p. 493.



the context of England contends that, '[T]he problem of how to hold a company criminally accountable for the harm produced in the course of its business activity continues to vex the English judiciary. The attempt to apply conventional criminal law to companies has not been a resounding success.'<sup>18</sup> Despite, and perhaps because of the apparent poverty of response so far, the case for development of the law has been made by many writers. Stone, for example, suggests that control of corporate misconduct has 'become one of the most significant challenges that society faces.'<sup>19</sup> Moreover, the requirement to face up to the challenge has attained greater importance because of the growth in importance of corporations and 'increasing social concern about the serious forms of harm occasioned by corporate activities.'<sup>20</sup>

The complexity and relative confusion of corporate criminal liability in Britain has historic origins. Criminal law and models of criminal liability are essentially individualistic having primarily been developed before the advent of the modern corporation. Stone explains that the

'pre-eminence of corporations in social activity is a state of affairs that the law inherited, but unfortunately did not plan for. When much of the law and political theory was taking shape, there were identifiable humans, operating independently of complex institutional frameworks, who did the things that it is the job of law to prevent. The law responded with rules and concepts concerning what motivated people, and what was possible, just, and appropriate towards them. There were, of course, all manner of corporations- churches, municipalities, guilds, universities- during the years the law was forming. But the courts were rarely pressed to consider whether the rules they were developing might be inappropriate or ineffective to deal with this new breed of social actor. Some of the reasons were doctrinal: There were doubts whether a corporation, a *persona ficta*, could be liable for wrongful acts. Others were practical: The size and structure of the early corporations were so unprepossessing that when a wrong was done, it was usually not hard to locate a responsible individual- a culprit- and apply the sanctions to him. The industrial revolution gave corporations a prominence, size and complexity that made further disregard impossible. But only in a few ways did the law account for the corporation a special sort of actor demanding the attention of specially adapted laws. The exceptions were almost entirely

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<sup>18</sup> Gobert, 'Corporate Criminality: Four Models Of Fault', 1994 14 Legal Studies 393-410 at p. 393.

<sup>19</sup> Stone, 'Controlling Corporate Misconduct', 1977 48 Public Interest 55-71 at p. 55.

<sup>20</sup> Smith and Hogan, *Criminal Law*, (2nd ed., 1969) at p. 589.

in shareholder-management relations, where the problems that arose were unique to corporations and where there were thus no pre-existing rules to accommodate each emerging situation...[B]ut such meddlings with the corporations internal governance were almost always designed to protect and define in advance the increasingly complex interests of the investor-not those of the corporations customer, its neighbours, or its fellow citizens. Where the corporation was performing acts that, in theory, the ordinary person could perform- polluting the environment producing harmful goods, committing crimes...-there already existed a network of rules addressed to the "persons." The most economical solution was simply to fit the corporation into this pre-existing body of law.'<sup>21</sup>

It was not solely the cumbersome approach of fitting corporations into pre-existing laws that resulted in laxity in the application of criminal law to corporations. There was a pre-occupation with developing laws which sought to sustain, protect and advance the corporate form which illustrated state paternalism and duplicity at its worst.<sup>22</sup> That pre-occupation stood in marked contrast to the expressed desire of many to develop more stringent forms of control over corporations and their agents.<sup>23</sup> Indeed, one of the arguments in favour of developing corporate criminal liability as a separate branch of jurisprudence is that 'While governmental regulation has, to some degree, controlled corporate power, it neither prevented serious social harm nor promoted a sense of corporate social responsibility.'<sup>24</sup> There is however, an emerging consensus that not only does something need to be done to counter that failure but also a growing belief that something can be done.<sup>25</sup>

Distilled to its most basic, this thesis endorses this belief and, in a Scottish context seeks to identify what such legislative intrusions might reasonably achieve. What seems obvious is that like individuals, companies have the power to make choices, and like individuals, they should be responsible for the foreseeable results of those choices. Corporate resources make those choices more informed or in any event, the capability of being better informed.<sup>26</sup> Accordingly, there is no moral, ethical,

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<sup>21</sup> Stone, n. 19 at p. 56.

<sup>22</sup> Wells, n. 5 at p. 551 talks of the regulation of companies as 'assuming their beneficence.'

<sup>23</sup> M. Clinard and P. Yeager, n. 7 at p. 301.

<sup>24</sup> Elkins, n. 5 at p. 77.

<sup>25</sup> Braithwaite, n. 5 at p. 310.

<sup>26</sup> Gobert, 'Corporate Criminality: New Crimes For The Times', 1994 Criminal Law Review 722-734 op cit. at p. 733.

or practical reason why corporations should not conform to the criminal law. In recognising the fairness of attaching criminal liability to the corporation it is also important to understand that the desire is to control the body corporate as a collective and that,

‘When people blame corporations, they are not merely channelling aggression against a deodand or some other symbolic object; they are condemning the fact that people within an organization collectively failed to avoid the offense to which corporate blame attaches.’<sup>27</sup>

Fisse later expanded this view by noting that ‘the traditional liberal concept of corporations as mere conduits of individualism is vulnerable to displacement by more corporate orientated visions of social control.’<sup>28</sup> Nevertheless, that individualism has been a significant inhibiting factor in the development of corporate criminal liability so much so that, ‘[c]ontemporary preoccupation with the notion that responsibility derives from and attaches to the autonomous individual renders us bereft of conceptual tools with which to confront corporate accountability.’<sup>29</sup> There is often a dichotomised conflict between individualism and enterprise liability; one that need not necessarily exist.

Cullen et al. point to a link between ‘progress’ and the increased threat of corporate crime arguing that ‘the risks posed increasingly by the nation’s air, earth and water are linked directly with our dependence on industrial processes and chemicals that generate toxic pollutants but also, ironically, provide us with the products, technological advances, cures and employment that sustain the quality of our lives.’<sup>30</sup> It seems fairly obvious however, that there need not be any correlation between progress and crime; one is not necessarily a consequence of the other. Whilst every legitimate enterprise may be an invitation to criminal exploitation by insiders’,<sup>31</sup> it need not necessarily be so. It is perfectly possible to harness the

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<sup>27</sup> Fisse, ‘*Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault And Sanctions*’, 1982 56 Southern California Law Review 1141 at p. 1149.

<sup>28</sup> Fisse, ‘*Corporate Compliance Programmes: The Trade Practices Act*’ 1989 17 Australian Business Law Review 356 at p. 358.

<sup>29</sup> Wells, n. 5 at p. 552.

<sup>30</sup> Cullen et al., n. 3 at p. 75.

<sup>31</sup> Cohen, ‘*The Concept Of Criminal Organisation*’, 1977 17 British Journal of Criminology 97-111 at p. 101.

beneficence of corporations without falling victim to their criminal capacity and that, ultimately, must be our aim. A scheme of corporate criminal liability will be only one important facet of a strategy to achieve that objective of responsibility and control.

Many commentators believe that the new weighted threat of corporate crime justifies the attachment of corporate criminal liability.<sup>32</sup> As indicated earlier, the impact and threat of corporate crime have been the subject of considerable world media attention. Illustrative of this is an article in the *New York Times* in 1985 which talks of a corporate crime wave exploding across America.<sup>33</sup> Various reasons for the new upsurge are canvassed in the article- moral breakdown in society, new pressures on managers in intensely competitive environment, and Government's laissez faire attitude being interpreted as a green light. *Fortune* in 1980 pointed to a picture of large scale violations going unrecorded. Their study identifies 11% of the major American corporations having engaged in at least one major delinquency. The article accepts that '[t]he big cases are often shockers.' And in an article in *The Nation* it was claimed

'While the suffering exacted by violent crime should not be deprecated, it is also true that the loss of lives and dollars from unsafe products, pollution and price fixing greatly exceeds that from all the Saturday night specials in America'... 'Corporate malfeasance is a tax of several billion dollars a years which cheats consumers and undermines the integrity of the business system....Corporate illegality is a several hundred-billion-dollar albatross around the economy's neck. It lowers productivity, inhibits innovation, boosts prices, mis-allocates resources, increases injuries and causes deaths. Not only does it squander economic growth and transfer costs from producers to consumers, it also sabotages the trust that binds businesses and the consumers together in a competitive market economy.'<sup>34</sup>

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<sup>32</sup> C. D. Stone, 'The Place Of Enterprise Liability In The Control Of Corporate Conduct', 1980 90 Yale L. J. 1; see also S. L. Hills, *Corporate Violence: Injury And Death For Profit*, (1987) at p. 201; see also Lederman, 'Criminal Law, Perpetrator And Corporation: Rethinking A Complex Triangle' 1985 76 Journal of Criminal Law and Criminology 285-340

<sup>33</sup> *The New York Times* 9/6/85

<sup>34</sup> M. Green and J. F. Berry, 'White Collar Crime Is Big Business' 1985 *The Nation* 689-707 at p. 704

Media interest is important in the formulation of interest and concern about corporate crime<sup>35</sup> but, as Coffee explains, 'behind the black and white world of our newspaper headlines, the colors of the surrounding landscape become increasingly dominated by the muted greys of moral ambiguity and legal uncertainty.'<sup>36</sup> Sutherland Burgess, Kadish and Tappin have all postulated at various times that there is an absence of moral indignation about white collar crime in the community and that in part explains weaknesses in the law and its enforcement relative to this type of crime. Grabosky et al however, describe Sutherland's (and others) perception of public tolerance of white collar crime as a 'myth'.<sup>37</sup> They point to studies around the world which offer empirical support for public indignation at the nature and extent of white collar crime.<sup>38</sup> According to them, the public view many forms of white collar criminality as more serious than traditional common crimes and that there is little evidence to support the thesis that the public are condoning white collar criminality.<sup>39</sup> Webster believes that attitudes to white collar crime vary from community to community.<sup>40</sup> Clinard on the other hand believes that society is still principally concerned with ordinary infractions rather than corporate crime.<sup>41</sup> Importantly, Tigar recognises that 'the debate over corporate liability is influenced by one's personal views about corporations and their power over economic life, and also by one's theory of the best means of persuading corporate directors and management to enforce law compliance by

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<sup>35</sup> 'Public concern over corporate accountability issues has since transformed the legal landscape... Aided by a budding corporate governance movement [corporate crime] has come to enjoy legitimacy alongside established criminal law doctrines..No mere survivor of the sceptic's scrutiny, the doctrine of liability now thrives in a regulatory climate eager to affix responsibility for a widening range of social and economic ills. The transformation is so complete that today, there is little reason for optimism that this form of liability might vanish from the scene.' K. Brickey, *'Rethinking Corporate Liability Under The Model Penal Code'* 1988 19 Rutgers L. R. 593-634 at p.596

<sup>36</sup> Coffee, n. 6 at p. 1118.

<sup>37</sup> Grabosky, *'The Myth Of Community Tolerance Toward White-Collar Crime'* 1987 20 Australian and New Zealand Journal of Criminology' 33-44.

<sup>38</sup> F. T Cullen, Link and Polanzi, *'The Seriousness Of Crime Revisited: Have Attitudes Towards White-Collar Crime Changed?'*, 1982 20 American Society of Criminology 83-100; L. S. Shrager and J. F.Short, *'Towards A Sociology Of Organizational Crime'*, 1980 25 Social Problems 407-419

<sup>39</sup> Grabosky, n. 37 at pp. 42-3, see also Braithwaite, *'Challenging Just Deserts: Punishing White Collar Criminals'* 1982 73 Journal of Criminal Law, Criminology and Police Science 723-763 at p. 733.

<sup>40</sup> W. H. Webster, *'An Examination Of FBI Theory And Methodology Regarding White-Collar Crime Investigation And Prevention'*, 1980 17 American Criminal L. R. 275-287 at p. 278.

<sup>41</sup> Clinard, n. 16 at p. 14.



employees. Management theory or macroeconomics arguably have more to tell us about such issues than does legal history.<sup>42</sup> Growing concern about corporate crime can be explained by noting the merging concern at malfeasance within political and economic institutions and a sensitising of the public to the crimes of the powerful.<sup>43</sup> The notion of legitimisation deficit<sup>44</sup> is also significant to the growth of corporate crime.<sup>45</sup> The public undoubtedly have a legitimate interest in corporations.<sup>46</sup> Concern about the modern corporation 'is intensified to the extent that its activities have necessarily ramified beyond the economic sphere of production of goods and service.'<sup>47</sup> Cullen et al argue that there is significant change in that 'people have come to think differently about corporations: about the potential for executives to pursue profits at any cost, about the harm that companies can inflict, about the social responsibility that business should exercise, and about what constitutes a tolerable level of risk as corporate decisions affect the welfare of workers, consumers and entire communities.'<sup>48</sup> Swigert and Farrell talk rather simply, but with the same conception, of corporate criminality having entered 'scientific and popular vocabulary.'<sup>49</sup>

Many writers convey hostility to the notion of corporate criminal liability. Snider, for example, offering a pseudo-Marxist perspective suggests that attempts at criminalising the corporation an approach is merely wall paper dressing designed to offer the appearance that the state is concerned enough to act against the capitalist classes to retain the integrity of the liberal democratic system.<sup>50</sup> Khanna

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<sup>42</sup> M. Tigar, 'It Does The Crime But Not The Time: Corporate Criminal Liability In Federal Law', 1980 17 American Journal of Criminal Law 211-234 at p. 213.

<sup>43</sup> Cullen et al., n. 3 at p. 2.

<sup>44</sup> M. Clinard, *Corporate Ethics And Crime- The Role Of Middle Management*, (1983), pp. 15-16.

<sup>45</sup> See Cullen et al., n. 3 at p. 10.

<sup>46</sup> Moll, 'In Search Of The Corporate Private Figure' 1978 6 Hofstra Law Review 334 at p 339. S. Wolf, 'Law And Moral Responsibility Of Organisations', in Pennock and Chapman *Criminal Justice*, (1985), at p. 267. 'Organizations in our society do many things that we, as members of society, have both the reason and the right to try to stop.'

<sup>47</sup> Chayes in Mason, n. 5 at p. 26.

<sup>48</sup> Cullen et al., n. 3 at p. 355.

<sup>49</sup> Swigert and Farrel, 'Corporate Homicide: Definitional Process In The Creation Of Deviance' at p. 162.

<sup>50</sup> P. Wickman and T. Dailey (Eds.), *White-Collar And Economic Crime*, (1982) at p. 253.

for different reasons expresses some doubt as to whether corporate criminal liability is the best way to influence corporate behaviour arguing that,

‘citizens might find imposing criminal liability on fictional entities farcical, and this response may decrease the criminal label’s effect for other types of crime.’<sup>51</sup>..[but]..‘some justification for corporate criminal liability may have existed in the past, when civil enforcement techniques were not well developed, but from a deterrence perspective, very little now supports the continued imposition of criminal rather than civil liability on corporations. Indeed the answer to the question ..‘corporate criminal liability: what purpose does it serve ?’- is “almost none”.’<sup>52</sup>

Smith and Hogan claim that ‘the necessity for corporate criminal liability awaits demonstration’<sup>53</sup> whereas Leigh suggests that the relevance and desirability of corporate criminal liability remains largely unexplored.<sup>54</sup> Professor Glanville Williams was also critical of the expansion of corporate criminal liability when commenting on the American Draft Model Penal Code in 1956. His view was that ‘the cases are not well -reasoned on fundamental policy, and it seems to me that judges have not always looked where they are going.’<sup>55</sup> It is difficult to know if these historic views represent the current attitude of these particular writers. Much has changed since their comments. Irrespective there is in the minds of some jurists a current uneasiness about the nature and scope of corporate criminal liability.<sup>56</sup> An illustration of this is to be found in the comments of Tigar who claims that,

‘It is no universal solvent to declare that a corporation should be a criminal defendant because the aggregation of capital it represents poses a greater risk of harm if that power is used for criminal purposes.’<sup>57</sup>

Francis argues that the principles of the laws of agency, crime and corporations point away from corporate liability.<sup>58</sup> McVisk meanwhile claims that not enough

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<sup>51</sup> V. S. Khanna, ‘*Corporate Criminal Liability: What Purpose Does It Serve?*’, 1996 109 Harvard L. R. 1477-1534 at 1478.

<sup>52</sup> Khanna, n. 51 at p. 1534.

<sup>53</sup> Smith and Hogan, n. 20 at p. 185.

<sup>54</sup> L. H. Leigh, *The Criminal Liability Of Corporations In English Law*, (1969) at p.131.

<sup>55</sup> G. Williams, *Commentary on Model Penal Code* at p. 179.

<sup>56</sup> K. Brickey, ‘*Corporation Criminal Accountability: A Brief History And An Observation*’, 1982 60 Washington University L. Q. 393-423 at p. 394.

<sup>57</sup> Tigar, n. 42 at p. 213.

<sup>58</sup> J. F. Francis, ‘*Criminal Responsibility Of The Corporation*’, 1924 18 Illinois L. R. 305-323. at p 323

time has been spent on determining the theoretical basis of liability for corporate criminal wrongdoing.<sup>59</sup> Conversely, controlling unlawful organisations has been described as an issue of 'increasing relevance.'<sup>60</sup> There is also conflict in the modern era between those who want more criminalisation and those who prefer a more co-operative strategy. According to the latter view '[c]riminalization strategies are rigid techniques which alienate potentially co-operative individuals and corporations.'<sup>61</sup> The two strategies are not necessarily exclusive. However, it remains the case that, 'Changing the old consensus and determining the rights and responsibilities of business, State and citizens is still in the early stages.'<sup>62</sup>

The utilitarian desire for control stands in contrast to free market philosophy which dictates that '[i]n a democratic society, freedom means the ability to pursue economic gain, to acquire property, and to seek happiness as the individual pleases. The social good generally encompasses the same ideals and yet recognises that unrestrained individual freedom may cause social harm.'<sup>63</sup> For some society has not developed enough of a consensus to tackle corporate wrongdoing. It is a moot point whether

'Many of the beliefs held within the corporate world about laws and government are nourished in a climate in which there is a lack of consensus about the values society is trying to advance. On the one hand, people do not want to deplete natural resources too rapidly or to pollute the air, land, and water, but on the other, they want abundant consumer goods at the lowest possible level.'<sup>64</sup>

Moreover, there must be recognition that the law and its rigorous enforcement might only be part of the whole picture of corporate crime control.<sup>65</sup> The position can be summed up by accepting that 'asymmetries of power in relationships have

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<sup>59</sup> W. McVik, 'Toward A Rational Theory Of Criminal Liability For The Corporate Executive', 1978 69 *Journal of Criminal Law and Criminology* 75.

<sup>60</sup> D. Vaughan, *Controlling Unlawful Organizational Behaviour: Social Structure And Corporate Misconduct*, (1983) at p. 20.

<sup>61</sup> Snider, n. 10 at p. 217.

<sup>62</sup> Snider, n. 10 at p. 228.

<sup>63</sup> Spurgeon and Fagan, 'Criminal Liability For Life Endangering Corporate Conduct', 1981 72 *Journal of Criminal Law and Criminology* 400 at p. 415.

<sup>64</sup> Clinard and Yeager, n. 7 at p. 68.

<sup>65</sup> Braithwaite, n. 5 at p. 305.



led to extensive attempts by persons to redress the balance using as their instrument the State'<sup>66</sup> but that the State is only one avenue of control.

This thesis attempts to explore not just the legal mechanisms for control but also offers, as a paradigm, a pluralistic system which both enables and encourages internal private mechanism and, at the same time, side by side has as an integral feature external control in the form of criminal liability and punishment. In seeking to develop an appropriate model of corporate criminal liability in a Scottish context it is necessary not just to reflect upon the problems the subject matter inevitably throws up, but to comprehend the vibrancy of the debate which corporate criminal liability engenders, and the issues that fuel that debate. There is a need to explore some of these fragmentary issues which contribute much to the complexity of the subject. Were corporate criminal liability simply a symbiosis of the law of corporations and the indigenous criminal law, the task of understanding the subject would be rendered much simpler. However, to understand the essence of the subject it is necessary to understand its core components- corporations and criminal law- but also to look beyond them to the almost theological debates on the issues of corporate personality and corporate offending. In addition very few introductory chapters would be complete without at least some reference to the historical perspective. Historical study often reveals much. The instruction of the history of corporate criminal liability in the Anglo-American jurisdictions lies in its illustration of the tensions of the subject matter. However, it is an incomplete history; one which awaits a modern chapter resonating with the triumph of corporate criminal liability. It is a history important for all that. What follows is a brief overview of these core issues in an attempt to contextualise corporate criminal liability and the key polemics it engenders.

## **1.1 Corporations**

It is trite to assert that corporations play a pervasive part in modern life. The business corporation dominates most fields of economic activity,<sup>67</sup> to a point where

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<sup>66</sup> Coleman in Ermann and Lundmann (Eds.), *Corporate And Government Deviance- Problems Of Organizational Behaviour In Contemporary Society*, (1996) at p. 58.

<sup>67</sup> R. A. Gordon, *Business Leadership In The Large Corporations*, (1945), at p. 13.

many of them exceed the power and wealth of nation states.<sup>68</sup> Of course, this state of affairs was not always so. Historically corporations, though significantly influential, did not exhibit the power evident in today's corporation. As an entity, the corporation appears to have its genesis in the Roman Empire<sup>69</sup> The early Roman 'corporation' exhibited only limited similarities to the modern corporation including the right to sue/be sued and the right to hold property. Limited liability was not evident in the early Roman corporations. Indeed the origins of limited liability are somewhat more opaque.<sup>70</sup> Timberg, ignoring claims of the earlier lineage of the corporation *per se*, argues that the modern corporation originates in the thirteenth century. He contends that,

'During the incubation period of four centuries, the corporate concept was in large measure the handmaiden of institutionalised religion. It was the legal device whereby a small collective enterprise devoted to God, learning or charity, such as an abbey or university, could preserve its continued existence, its legal rights, and its properties, even though the original human members of the group enterprise had all died.'<sup>71</sup>

### **The Development Of Corporations In Britain**

Whatever the true origins, all writers (including Timberg) note the change of emphasis following the Industrial Revolution. The early British corporation was a device for mobilising private resources in the King's business.<sup>72</sup> From the Industrial Revolution onwards the primary function of corporateness was the creation of economic wealth.<sup>73</sup> According to Stone, the original corporations were so 'unpresupposing' that it was easy to locate the individual actor who was the 'true' culprit individualism could be sustained without any problems.<sup>74</sup> However,

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<sup>68</sup> Cullen et al., n. 3 at p. 107

<sup>69</sup> R. B. Campbell, '*Limited Liability For Corporate Shareholders: Myth Or Matter Of Fact*' 1975 63 Kentucky L. J. 23-71 at p. 24; O. Handlin and M. F. Handlin, '*Origins Of The American Business Corporation*', 1945 5 Journal of Economic History 1-23 at p. 1; Universitas (Corporation) described by Gierke see J. Dewey, '*The Historic Background Of Corporate Legal Personality*' 1926 35 Yale L. J. 655-673 at p. 658.

<sup>70</sup> Campbell, n. 69 at p. 25.

<sup>71</sup> S. Timberg, '*The Corporation As A Technique Of International Administration*', 1952 19 University of Chicago L. R. 739-758 at p. 739.

<sup>72</sup> Chayes in Mason (Ed.), n. 5 op cit. p. 34.

<sup>73</sup> Timberg, n. 71 at p. 739.

<sup>74</sup> Stone, n. 32 at p. 3.

the Industrial Revolution put an end to low visibility of corporations<sup>75</sup> and, as a consequence the modern era is one marked by the fact that the corporation has become the generally accepted method of conducting of all private business enterprises.<sup>76</sup> Following this dramatic transition, Goldschmidt argues that government 'surrendered early and easily' power over the size structure and managerial responsibilities of corporations.<sup>77</sup>

In England the development of the modern corporation is often traced to the medieval guilds.<sup>78</sup> In the feudal period prior to this, emphasis was on the individual as a natural person. Cullen et al. explain that,

'[T]he concept of the person was simple and limited during the feudal period. It denoted the rights and responsibilities of an individual as a natural person, and was rarely applicable to a collective entity. Partnerships existed but merely as assemblages of individuals, each with his or her own rights and responsibilities, not as Juristic persons. Corporations thus did not exist.'<sup>79</sup>

The Merchant Guilds formed part of the structure of the Local Boroughs which 'represented a closed economic group of sole traders characterised by corporate monopoly and privilege.'<sup>80</sup> These guilds were essentially cartels which sought to regulate trade so that even the poorest of them maintained an adequate level of profit. The linkage to Local Government was significant. Local Boroughs represented a manifestation of the growth of the State and its influence over society. That influence had both a civil and criminal law dimension. Some of the very earliest corporate crime cases evolved from municipal services. Importantly, the English Boroughs were brought under the ambit of 'juristic persons' further recognising the concept of the collective entity as distinct from the natural person. Cullen et al. observe that,

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<sup>75</sup> Stone, n.32 at p. 4.

<sup>76</sup> Timberg, n. 71 at p. 740.

<sup>77</sup> Goldschmidt, 'The Greening Of The Boardroom: Reflection On Corporate Responsibility' 1973 10 Columbia Journal of Law and Social Problems 15-46 at p. 19.

<sup>78</sup> Holdsworth, 3 History of English Law (3rd Ed. 1923) 470. For developments prior to this see Cullen et al., n. 3 at pp. 107-9

<sup>79</sup> Cullen et al., n. 3 at p. 109.

<sup>80</sup> Farrar, *Farrar's Company Law*, (3rd ed., 1991) p. 15.

‘[T]he corporation emerged as the transition from feudalism to capitalism generated demands for new business forms, collective entities that could accommodate the combined resources of individuals and facilitate business on a grand scale. The State, a collective entity itself, responded to these demands by creating such forms, which it then recognised as juristic persons, thus it gained political support from these entities while maintaining control over them.’<sup>81</sup>

The only means of incorporation at this time was through Royal Charter or Statute.<sup>82</sup> The original ethos behind the granting of incorporation through Royal Charter was to confer a measure of protection and status.<sup>83</sup> The concept was invariably linked to colonialisation.<sup>84</sup> However, usage of incorporation by Royal Charter developed to a point where its principal purpose was to regulate trade. The similarities between these incorporated bodies and the modern corporation are negligible. Burrows, for example, notes that until the 19th century corporations were relatively unimportant.<sup>85</sup> These early collectives were umbrella organisations in which individual entrepreneurs could combine under the auspices of the incorporated association. These individuals continued to survive on their own merits and represented individual units in their own right. Incorporation was essentially based on patronage. Corporations were children of the State and in many instances performed the duties of the State.<sup>86</sup>

From these early, loose incorporations developed the concept of joint-stock. Individuals joined together in combinations for the exploitation of a monopoly trading position granted to them. Of these, the East India Company was the first to combine incorporation, overseas trade, and joint-stock raised from the general public.<sup>87</sup> These joint-stock companies offer greater similarities to modern companies. Writing in 1776, Adam Smith claimed that ‘[T]he only trades which it seems possible for a joint stock company to carry on successfully...are those of

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<sup>81</sup> Cullen et al., n. 3 at p. 116.

<sup>82</sup> P. Stein, ‘*Nineteenth Century English Company Law And The Theories Of Personality*’, 1983 *Quaderni Fiorentini* 502-519 at p. 503.

<sup>83</sup> Farrar, n. 80 at p. 16.

<sup>84</sup> Cullen et al., n. 3 at p. 113.

<sup>85</sup> Burrows, ‘*The Responsibility Of Corporations Under Criminal Law*’ 1948 *Criminal Science* 1-19 at p. 1.

<sup>86</sup> Cullen et al., op cit., n. 3 at p. 112.

<sup>87</sup> Cullen et al., op cit. n. 3 at p. 17.

which all the operations are capable of being reduced to what is called a routine.<sup>88</sup> It was generally believed that joint-stock companies were unsuited to manufacture, agriculture or commerce<sup>89</sup> and indeed, even by the middle of the 19th century there were few joint-stock companies engaged in manufacturing.<sup>90</sup>

Following considerable public scandal over the South Sea Company, the Bubble Act<sup>91</sup> attempted to suppress the formation of companies which sought to act under obsolete charters and other charters previously granted by the Crown.<sup>92</sup> Only those granted under 'genuine charter' would be permissible. The others were to be punished as common nuisances and liable to the ancient punishment of *praemunire*.<sup>93</sup> Injured parties could sue for treble damages and brokers dealing in such company shares were liable to a fine of £500. It was subsequently claimed of the Act that 'it had more of temporary malice and revenge than of permanent wisdom and policy.'<sup>94</sup> The Bubble Act and the related corporate collapse were instrumental in retarding the development of joint stock companies for a considerable period of time.<sup>95</sup> According to Hunt, the Act exercised,

'a deterrent psychological effect upon company formation even after its repeal under the pressure of a rising industrialisation a century later. In fact, the history of the business corporation or joint-stock company in England during the one hundred and fifty years following the statute of 1720 is the story of an economic necessity forcing its way slowly and painfully to legal recognition against strong commercial prejudice in favour of "individual" enterprise, and in the face of determined attempts of both the legislature and the courts to deny it. Several eruptions of company promotion and speculation in defiance of the law, and new industries, the development of which was beyond the limited resources of the individual capitalist, were forces which operated finally to break down opposition and cause Parliament, retracing its steps, gradually to erect the legal framework of the new form of business organisation.'<sup>96</sup>

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<sup>88</sup> Smith, *Wealth Of Nations* Book V Part III Art 1

<sup>89</sup> S. Florence, *Ownership, Control And Success Of Large Companies*, (1961), at p. 1.

<sup>90</sup> Florence, n. 89 at p. 2 asserts only 4.9%. He contrasts this with 1933 when it was 16.5%.

<sup>91</sup> 6 Geo. I, c18

<sup>92</sup> See Brickey, n. 56 at pp. 398-9.

<sup>93</sup> Forfeiture of everything and be out of the King's protection. see B. C. Hunt, *The Development Of The Business Corporation In England 1800-1867*, (1936), at p. 9

<sup>94</sup> *Morning Chronicle* 9/2/1825 quoted in Hunt, n. 93 at p. 8.

<sup>95</sup> See Hunt, n. 93 at p. 7.

<sup>96</sup> Hunt, n. 93 at p. 13.



The years 1824 and 1825 saw a massive expansion of company formation. This was so because 'capital was abundant and rapidly increasing, no longer taxed and absorbed by war expenditure.' In April 1824 there were 250 private bills before Parliament for incorporation.<sup>97</sup> Despite parliamentary objections,<sup>98</sup> corporate formation continued apace. In 1825 June, in response to mounting criticism of the draconian nature of the Bubble Act, it was repealed. The common law was now deemed to be sufficient to deal with fraudulent formations. Despite the repeal of the Act the courts continued to take a dim view of unincorporated joint-stock associations.<sup>99</sup> Gradually, the courts modified their position and declined to hold joint-stock associations illegal at common law.<sup>100</sup>

The emergence and growth of the railway companies are attributed with having a major impact on the development of corporate crime itself. Railways required considerable capital investment. The obvious way of doing so was to raise capital from the public. The existing methods of incorporation proved far too cumbersome. Royal Charter seemed inappropriate and Act of Parliament was both difficult and expensive.<sup>101</sup> A Select Committee under the chairmanship of William Gladstone reported in 1844 the need for registration of deeds of settlement. The resultant legislation is generally considered the first of the Companies Acts.<sup>102</sup> Companies so registered were imbued with the qualities of corporations. The ability to register meant that incorporation was no longer determined by privilege, though privilege undoubtedly continued. In the twelve years after the passage of the 1844 Act some 910 companies registered. On application they were provisionally registered and some time thereafter were granted full registration. The 1844 Act did not offer limited liability. This was available by contracts between shareholders and creditors. Limited Liability was formally introduced by the Limited Liability Act 1855.<sup>103</sup> This ensured that henceforth the concept of

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<sup>97</sup> Hunt, n. 93 at p. 32.

<sup>98</sup> Hunt, n. 93 at pp. 33-4.

<sup>99</sup> Hunt, n. 93 at pp. 41-3; *Duvergier v Fellowes* 1828 5 Bingham 267; *Walburn v Ingleby* 1833 Mylne and K 61 *Blundell v Windsor* 1835 8 Sim 601.

<sup>100</sup> *Garrard v Hardy* 1843 5 Man and Gr. 471; *Harrison v Heathorn* 1843 6 Man and Gr. 81

<sup>101</sup> Farrar, n. 80 at p. 19.

<sup>102</sup> 7 & 8 Vict, c110.

<sup>103</sup> Limited liability finally conceded in 1855 see Stein, n. 82 at p. 508

limited liability did not have to be developed on the basis of contract.<sup>104</sup> In the process it supplanted individual liability with the collective liability of the separate capital of the company. With the advent of limited liability the growth of incorporated companies was quite dramatic.

In the modern era registration has predominated as the method of State sanction.<sup>105</sup> According to Hunt, 'freedom of incorporation was achieved only after a protracted and bitter struggle against deeply rooted prejudice, widespread misconception, and even fear.'<sup>106</sup> By the 1860s joint-stock companies were well established. In the period 1863-66 over 3500 companies were registered of which 900 offered shares to the public.<sup>107</sup> *The Times* was able to claim that the world was growing into 'one vast mass of impersonalities.'<sup>108</sup> The growth was marked not only by the formation of new companies but by the conversion of hitherto private firms into limited companies.<sup>109</sup> Reflecting on these developments, Hunt was moved to say that,

'After more than a century of struggle against deeply rooted prejudice and widespread misconception, and having weathered the storm of the sixties, freedom of incorporation was a definitely accomplished fact. The joint stock company and the indispensable incident of limited liability, both at first prohibited except under special and rare Parliamentary discretion to favour had later become a carefully guarded bureaucratic concession. Henceforth, they were privileges to be recognized as of common right.'<sup>110</sup>

As Farrar suggests, the development of the modern company has been a combination of utility and responsibility.<sup>111</sup> Modern corporations are fundamentally different from their counterparts in the 19th century.<sup>112</sup> Limited liability and incorporation were both recognition of the benefits that companies could bestow on the wider community. The wealth they created, the opportunities

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<sup>104</sup> Maitland F W (1900) 'Introduction' in Gierke, *Political Theories Of The Middle Age*, Cambridge Univ. Press p xxxix-xi at p. 392.

<sup>105</sup> Hunt, n. 93 at p. 4.

<sup>106</sup> Hunt, n. 93 at p. 6.

<sup>107</sup> Hunt, n. 93 at p. 146.

<sup>108</sup> *The Times* 9th May 1865

<sup>109</sup> Hunt, n. 93 at p. 151.

<sup>110</sup> Hunt, n. 93 at p. 157.

<sup>111</sup> Farrar, n. 80

<sup>112</sup> Clinard and Yeager, n. 7 at p. 204.

they presented, were arguably of singular importance in the modern economic landscape. That fact remains equally true in the modern era; it is a fact that corporations have contributed enormously to the development of civilisation.<sup>113</sup> Despite their invaluableness, the modern era has been dominated by a desire for greater responsibility by corporations. The balance between unbridled wealth creation and greater social responsibility has moved steadily in favour of the latter. The development of responsibility is manifested in the tighter regulation of the modern company, the increasing disclosure provisions and importantly, in the context of this study- the desire to append criminal responsibility to companies for their wrongdoing.

Developments in America followed a similar pattern to those in England. Three decades after the American Revolution, incorporation was expanding at an accelerating rate.<sup>114</sup> Indeed expansion in America was greater than the more advanced economies of England and Europe. In part this is explained by the relative ease of incorporation and the fact that other organisational structures (partnerships) were utilised more fully in England and Europe. Limited liability was supposed to be an important early feature of American companies but there is little evidence for this supposition.<sup>115</sup> Nor could it be claimed that the American corporation was free from State interference.<sup>116</sup>

It was estimated that in America at the end of 1968 there was one corporation for every 126 persons.<sup>117</sup> The modern growth rate in numbers is quite spectacular and has outstripped proportionate human expansion.<sup>118</sup> In 1980 there were roughly 2 million corporations in USA alone.<sup>119</sup> Growth in each category large, medium, and

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<sup>113</sup> Clinard and Yeager, n. 7 at p. 2; Oleck, 'Remedies For Abuses Of Corporate Status' 1973 9 Wake Forest L. R. 463-502 at p. 466.

<sup>114</sup> Handlin and Handlin, n. 69 at p. 2.

<sup>115</sup> Handlin and Handlin, n. 69 at pp. 8-17.

<sup>116</sup> Handlin and Handlin, n. 69 at p. 17.

<sup>117</sup> 1.6 million active profit seeking. N. H. Jacoby, *Corporate Power And Social Responsibility*, (1973) at p. 21.

<sup>118</sup> Corporate growth 1917-1969 increased fivefold in America according to Coleman in Ermann and Lundman, n. 66 at p. 51.

<sup>119</sup> Clinard and Yeager, n. 7 at p. 3.



small has been similarly spectacular.<sup>120</sup> Jacoby estimated that corporations owned 28% of the tangible wealth in the USA in 1973.<sup>121</sup> In America it also the case that there is wider diffusion of share ownership with one in four of the population owning shares.<sup>122</sup> Despite the wider diffusion there is nonetheless a high concentration of ownership amongst the wealthier members of society.<sup>123</sup>

### Modern Corporations

In recent times, the global trend has been towards enlargement of corporations and the creation of multi-national enterprises. They have become central to corporate activity.<sup>124</sup> Blumberg says of the large corporation '[I]n addition to its predominant economic role in providing goods, services and employment, the mega-corporation has developed into a social and political organization of profound significance. In fact, it has become a basic social institution and a center of power resembling governmental structures.'<sup>125</sup> Grygier meanwhile notes the irony that the larger the corporation the greater its capacity for harm but also the greater its contribution to economics, employment technology and other beneficial consequences.<sup>126</sup> According to Kobrin, many corporations have 'transcended the limitations of the market and have accumulated economic and political power.'<sup>127</sup> It is true that '[F]or a large portion of the ...population the corporation may be the single most important factor in determining the nature of the individual's working and non-working environment.'<sup>128</sup> Certainly, it seems clear that 'the global corporation negates the assumptions of classical and neo-classical economic theory and transcends the boundaries of the nation-state in its values, interests and

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<sup>120</sup> Stone, in Fisse and French (Eds.), *Corrigible Corporations And Unruly Law* (1985) at p. 28.

<sup>121</sup> A figure that has not changed over the previous 50 years: Stone, in Fisse and French (Eds.), n. 120 at p. 35.

<sup>122</sup> Stone, in Fisse and French (Eds.), n. 120 at pp. 36-7.

<sup>123</sup> Richest one fifth owned 82 percent of the stock.

<sup>124</sup> Drucker, *The Concept Of The Corporation*, (1946), at p. 18.

<sup>125</sup> Blumberg, *The Mega-Corporations Of American Society: The Scope Of Corporate Power*, (1975)

<sup>126</sup> Grygier, 'Corporate Crime: Legal And Administrative Sanctions', 1992 *Eurocriminology* 15-27 at p. 24.

<sup>127</sup> S. J. Kobrin, 'Morality, Political Power And Illegal Payments By Multi-national Corporations', 1976 11 *Columbia Journal of World Business* 105-110 at p. 106.

<sup>128</sup> Note 'Libel And The Corporate Plaintiff' 1969 69 *Columbia Law Review* 1496 at p. 1506.

concerns.<sup>129</sup> In this period there has also been an emergence of multinational corporations 'as a powerful agent of social and economic change.'<sup>130</sup> Jacoby claims 'the multinational corporation is, among other things, a private "government" often richer in assets and more populous in stockholders and employees than some nation States in which it carries on business.'<sup>131</sup>

Also in the typology of modern corporation there is an emergence of large endocratic organisations- large publicly held corporations whose stock is scattered in small fractions amongst thousands of stockholders.<sup>132</sup> One of the problems of such corporations is that,

'Not only is the number of stockholders large, but many of them are not biological persons- instead they are banks, pension funds, insurance companies, and mutual funds. The paradox is that most of these persons and institutions have very little interest in the conduct of "their" corporation: What they want is a good return on their money, better than they can get from any other corporation.'<sup>133</sup>

It is projected that soon 75% of world trade will be controlled by only 300 corporations.<sup>134</sup> Corporate business is outgrowing national boundaries.<sup>135</sup> There is also a process of diffusion evident in modern corporate activity whereby corporations create holding companies with constellations of related corporations.<sup>136</sup> Viewed as a repository of both economic and political power,<sup>137</sup> the modern corporation is often seen as a threat to individual autonomy rather than a simple servant of economic progress.<sup>138</sup> The powerful can and do use their power to avoid detection and scrutiny.<sup>139</sup> Large corporations are repositories of financial wealth which can be made available to politicians who support corporate

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<sup>129</sup> Gross in Geis and Stotland, *White Collar Crime Theory And Research*, (1980) at p. 137.

<sup>130</sup> Jacoby, n. 117 at p. 94.

<sup>131</sup> Jacoby, n. 117 at p. 94

<sup>132</sup> Rostow in Mason, n. 5.

<sup>133</sup> Gross in Geis and Stotland, n. 129 at p. 57.

<sup>134</sup> See Braithwaite, '*Inegalitarian Consequences Of Egalitarian Reforms To Corporate Crime*' 1980 53 Temple L. Q. 1127-1146 at p. 1129.

<sup>135</sup> Jacoby, n. 117 at p. 94.

<sup>136</sup> Berde, '*The Theory Of Enterprise Entity*', 1947 47 Columbia Law Review 343-358 at p. 343.

<sup>137</sup> Leigh, n. 54 at p. 19.

<sup>138</sup> Oleck, n. 113 op cit. 463

<sup>139</sup> P. R. Wilson and J. Braithwaite, *Two Faces Of Deviance: Crimes Of The Powerless And Powerful*, (1978), at p. 101.

interests generally or those of that corporation specifically.<sup>140</sup> Generally speaking there is often a direct, and at times insidious relationship between large corporations and the process of State policy formulation.<sup>141</sup>

### **The Nature Of The Corporation**

Turner claims that the essential ingredient of any organisation is that it should have some capacity to act as a single entity, to act in an integrated manner and as a consequence, '[E]very organization therefore, must seek to establish some internal discipline, some internal set of constraints to ensure that its members do act as a unit.'<sup>142</sup> An organisation will establish a hierarchy and a process of communication to ensure continuity of outlook, practice and organisation.<sup>143</sup>

Tombs doubts whether corporations despite the fact that they present themselves as such, act as unified rational entities.<sup>144</sup> Blackstone in his commentaries identified five characteristics of corporations :- perpetual succession, capacity to sue and be sued in corporate name, the right to hold property, the possession of a common seal by which the corporation could oblige itself in law, and the power to make rules for the better government of its members.<sup>145</sup> Dan Cohen in contrast claims that organisations have eight essential properties- structure, permanence, decision-making, size, formality, complexity, functionality and goal orientation.<sup>146</sup> Drucker argues that institutions need to be analysed in the context of the conflicts that 'exist between the purpose of the corporation as an autonomous body and the needs of society in which it lives.'<sup>147</sup> Arguably, corporations should not be free from social obligations but social obligations should be harmonious with corporate objectives.<sup>148</sup> Despite this, it is a truism that well intentioned corporations often fail to meet moral and legal standards.<sup>149</sup> Even though a corporation may have

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<sup>140</sup> H. C. Barnett, 'The Production Of Corporate Crime In Corporate Capitalism', in Wickham and Dailey (Eds.), *White Collar and Economic Crime*, n. 32 at p. 164.

<sup>141</sup> Barnett, n. 140 at p. 164.

<sup>142</sup> B. Turner, *Manmade Disasters*, (1978) at p.163.

<sup>143</sup> Turner, n. 142 at p. 64.

<sup>144</sup> Tombs in Pearce and Snider (Eds.), *Corporate Crime: Contemporary Debates*, (1995) at p. 133.

<sup>145</sup> See Stein, n. 82 at p. 503.

<sup>146</sup> M. Dan-Cohen, *Rights, Persons And Organisations*, (1986), at pp. 33-37.

<sup>147</sup> Drucker, n. 124 at p. 24.

<sup>148</sup> Drucker, n. 124 at p. 27.

<sup>149</sup> Yeager, in Pearce and Snider, n. 144 at p. 158.

other goals,<sup>150</sup> profitability is often suggested as the litmus test of corporate responsibility.<sup>151</sup> Levitt argues that corporations are not designed to promote social issues nor are they good at handling them.<sup>152</sup> Generally speaking, there are extensive historical roots to the challenge of the idea of corporate responsibility.<sup>153</sup> Interest in social responsibility of corporations has developed in response to a crisis of confidence in corporate operations.<sup>154</sup> Indeed, it has been suggested that corporations have been coerced into adopting a greater public interest approach.<sup>155</sup> Despite the fact that the development of the corporation was predicated on the advancement of societal good, it remains the case that 'the acts done on behalf of business enterprises are of course done primarily for private gain.'<sup>156</sup>

Maitland's view is that the corporation is a right and duty bearing unit.<sup>157</sup> However, Oleck recognises that 'The general tendency..has been to enlarge the authority of the corporation with little consideration of the responsibility aspect vis a vis the general community.'<sup>158</sup> Caroline also notes the transition from societal good to private good and the conflict now engendered by that transition. Her view is that,

'the corporation is itself a neutral tool that can fulfil a legitimate role in society by providing opportunities to maximise profit and thus maximise gain for investors. The conscience of the corporation is geared not to societal goals but to achieving economic ends and thus legislative regulation is imperative. In attempting to manage its environment conscious and deliberate actions result in conflict with legislation.'<sup>159</sup>

History then points to an increasing and alarmingly dangerous, positioning of corporations within society. The criminal law represents only one avenue which might check abuse of their dominant position. The law of corporations has served

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<sup>150</sup> Hills, n. 32 at p. 190.

<sup>151</sup> T. Donaldson, *Corporations And Morality*, (1982) at p. 60.

<sup>152</sup> Levitt, 'The Dangers Of Social Responsibility', 1958 Harvard Business Review.

<sup>153</sup> Donaldson, n. 151 at p. 61ff.

<sup>154</sup> Clinard and Yeager, n. 7 at p. 200.

<sup>155</sup> See Rostow, in *The Corporation In Modern Society*, (1961, Mason Ed.), n. 5 at p. 68.

<sup>156</sup> Muir, 'Tesco Supermarkets, Corporate Liability And Fault' 1973 5 New Zealand Universities L. R. 357-72 at p. 357.

<sup>157</sup> Referred to in Dewey, n. 69 at p. 656.

<sup>158</sup> Oleck, n. 113 at p. 466.

<sup>159</sup> Caroline, 'Corporate Criminality And The Courts: Where Are They Going?' 1985 27 Criminal L. Q. 237-256 at p. 248.

to promote the corporation as a wealth creating entity. The original benevolence which corporations exhibited towards society generally has been supplanted by the self interest of the corporation, its members and its agents. The historical perspective at least offers us an insight into how we have arrived at a position where there are legitimate concerns that the power of corporations can challenge the State, the law it promulgates, and the societal interests which it embodies. The development of modern corporations took place almost oblivious to the operation of the criminal law. The belated attempts to establish congruence between the two are undoubtedly hampered by the passage of time. As the Anglo-American jurisprudence illustrates it is nevertheless possible.

## 1.2 Criminal Law

Any system of corporate criminal liability must stand on all fours with the fundamentals of criminal law itself. Premised on current social needs and notions of morality, law structures and limits our business, social, and familial activity.<sup>160</sup> The imagery of 'crime' is powerful and often results in stereotypical assumptions.<sup>161</sup> In addition criminal law is primarily individualistic in nature. This inherent individualism of criminal law which challenges the collectivism of corporate criminal liability is outlined by Cullen et al. who explain that,

'While crime is easily defined as a violation of social norms and (arguably) as socially harmful, our understanding of unlawful conduct tends to be fixated at the individual level. In fact the entire crime punishment nexus is highly individualistic. In the traditional model one person harms another and receives punishment. Criminal activity at a more complex level- such as a collective entity harming great numbers of scattered victims and receiving punishment- simply does not suggest itself and was inconceivable at common law. The early law was designed to regulate the behaviour of individuals as natural persons, not a juristic person like the corporation.'<sup>162</sup>

Criminal law is also flexible. Cullen et al. point to its fluidity and its link to social values and public morality prevailing at any given time. They state,

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<sup>160</sup> Spurgeon and Fagan, n. 63 at p. 409.

<sup>161</sup> Cullen et al., n. 3 at p. 320; see also Henshel and Silverman, *Perceptions And Criminal Process* Canada Journal of Sociology, (1975), at p. 39 quoted in Goff and Reasons, *Corporate Crime In Canada*, (1978), at p. 13.

<sup>162</sup> Cullen et al., n. 3 at p. 104.



‘[If] an act is not a crime, either it does not transcend the boundaries or the law has temporarily lagged behind the moral sentiments. But boundaries are not permanent, and they change, though often with some lag, as society changes. Thus a behaviour may be considered within society’s moral boundaries at one time but outside it at another. Therefore certain actions of corporations may not have been considered harmful enough to violate the moral boundaries at common law but were viewed later as sufficiently serious to deserve the label “criminal.”’<sup>163</sup>

Sayre pointed to an expansion of the criminal law as part of the process of fluidity. His concern was that the criminal law was expanding into areas of social concern hitherto not considered criminal and that the criminal law now embraced morally neutral offences.<sup>164</sup> Sayre talked of a conflict of interest in the criminal law between the right of the individual liberty from conviction in the absence of moral blameworthiness and the social interest in the security and well-being of society. This particular conflict was supposedly resolved by the development of the concept of *mens rea*. Packer argues that ‘Crime is a socio-political artefact, not a natural phenomenon. We can have as much or as little of it as we please, depending on what we choose to count as criminal.’<sup>165</sup> The trend in the modern era has been to criminalise a greater and greater number of activities. Criminalising certain activities of the corporation is a feature of this trend and despite the evident problems, prosecution of corporate crime in the common law jurisdictions around the world has become commonplace.<sup>166</sup> This fact sits ill at ease with many commentators. Caroline, for example, is critical of the expansion of criminal liability to corporations arguing that,

‘The traditional theories of the criminal law have been bent and strained by the judiciary in an attempt to make them adapt to the economic realities and organizations of the market-place. The clothes do not fit.’<sup>167</sup>

One clear *raison d’être* of criminal law is to protect society against special and specific harms.<sup>168</sup> According to McVisk, the most fundamental purpose of any

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<sup>163</sup> Cullen et al., n. 3 at p. 104.

<sup>164</sup> Sayre, ‘*Criminal Responsibility For The Acts Of Another*’ 1930 43 Harvard L. R. 689-723 at p. 717.

<sup>165</sup> Packer, *The Limits Of Criminal Sanction*, (1968), at p. 364.

<sup>166</sup> Orland, n. 1 at p. 21.

<sup>167</sup> Caroline, n. 159 at p 254

<sup>168</sup> Seney, ‘*A Pond As Deep As Hell - Harm, Danger And Dangerousness In Our Criminal Law*’ 1971 17 Wayne L. R. at p. 1096-7; M. A. Cohen, ‘*Corporate Crime And Punishment: A Study Of*

criminal law is to induce external conformity with its rules.<sup>169</sup> Integral, to that is the recognition that vengeance was an early source of criminal law<sup>170</sup> but this has subsequently been displaced by deterrence.<sup>171</sup> The function of criminal law is to preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of others.<sup>172</sup> There are those who believe that the criminal law also plays an important part in the socialisation process which deters crime.<sup>173</sup> Edgerton claims that,

‘The chief civilized purpose of criminal law is deterrence- the prevention of acts which are conceived to injure one social interest or another. The question is not whose mind is “guilty” but whose responsibility will serve the deterrent purpose. It seems evident that this purpose is further served if corporate criminal responsibility is added to criminal responsibility of the corporations representatives. If the corporation itself is immune, it often stands to gain rather than to lose by the commission of crime in its business, and directors, stockholders and agents, from loyalty to it or in the hope of bettering their position in it or through it, may take a chance of personal responsibility for the sake of corporate advantage.’<sup>174</sup>

Crime hurts community or public interests<sup>175</sup> but the myth of crime automatically involving public harm should be dispelled.<sup>176</sup> Criminal law’s purpose is to protect those interests which are most central to life in society<sup>177</sup> and to establish an authoritative framework for the official response to lawbreaking.<sup>178</sup> Notwithstanding this ‘The outer boundaries of the criminal law must be set with

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*Social Harm And Sentencing Practice In The Federal Courts 1984 -1987* 1989 26 American Criminal L. R. 1099

<sup>169</sup> McVisk, n. 59 at p. 77.

<sup>170</sup> McVisk, n. 59 at p. 75.

<sup>171</sup> McVisk, n. 59 at p. 77.

<sup>172</sup> Wolfenden Report quoted in Williams, ‘*The Proper Scope And Function Of Criminal Law*’ 1958 74 Law Q. R. 76-81 at p. 77.

<sup>173</sup> Davis, in Pennock and Chapman (Eds.), n. 46 at pp. 123-4. Actual severity however, is not synonymous with the notion of legal threat, see Coffee, ‘*Corporate Crime And Punishment: A Non-Chicago View Of The Economics Of Criminal Sanctions*’ 1980 17 American Criminal L. R. 419 at p. 423

<sup>174</sup> Edgerton, ‘*Corporate Criminal Responsibility*’ 1927 36 Yale L. J. 827-44 at p. 833.

<sup>175</sup> Seney, n. 168 at p.1098.

<sup>176</sup> Seney, n. 168 at p.1099.

<sup>177</sup> See Parker, ‘*Criminal Sentencing Policy For Organisations*’ 1989 26 American Criminal L. R. 513 at p. 568

<sup>178</sup> Ashworth, *Essays In Honour Of Sir JC Smith*, (1987, P Smith Ed.) at p. 8; see also Smith, ‘*Liability For Endangerment*’ 1983 Criminal L. R. 127-136 at p. 127.

due respect for individual rights as well as crime prevention.<sup>179</sup> Sutherland suggests two elements of crime- socially injurious conduct and legal provision of a penalty for the act.<sup>180</sup> Hart meanwhile defines crime as conduct which will incur a formal and solemn pronouncement of the moral condemnation of the community.<sup>181</sup> It has further been suggested that although the criminal law may be seen as society's primary mechanism for showing disapproval of harmful conduct, the dividing line between criminal activity and other forms of wrongdoing has become increasingly blurred.<sup>182</sup> Criminal law may also be viewed as an attempt to protect the powerless from the depredations of the powerful.<sup>183</sup>

The Marxist perspective is that law simply reflects 'the basic constellation of power in a society.'<sup>184</sup> Engels claimed 'In a modern state, law must not only correspond to the general economic position and be its expression, but must also be an expression which is consistent in itself, and which does not, owing to inner contradictions, look glaringly inconsistent. And in order to achieve this, the faithful reflection of economic conditions is more and more infringed upon. All the more so, the more rarely it happens that a code of law is the bold, unmitigated, unadulterated expression of the domination of a class- this in itself would already offend the "conception of justice".'<sup>185</sup> Cullen et al. recognise that 'historically, for a variety of reasons, many questionable activities that are relatively common to the powerful have seldom been defined as crime, and hence have not mobilised the state machinery that redresses criminal behaviour.'<sup>186</sup> However, things have changed and are continuing to change.<sup>187</sup> More and more corporations are facing the wrath of the criminal law including subjection to traditional criminal offences.

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<sup>179</sup> Ashworth, n. 178 at p. 17.

<sup>180</sup> Sutherland, *On Analysing Crime*, (1973), at p. 63.

<sup>181</sup> Hart, 'Aims Of The Criminal Law' 1958 23 Law and Contemporary Problems 401 at p. 405.

<sup>182</sup> Cartwright, 'Defendants In Consumer Protection Statutes: A Search For Consistency' 1996 59 Modern L. R. 225-240 at p. 225.

<sup>183</sup> Braithwaite, n. 134 at p.1127; Wells, 'Corporate Manslaughter: A Cultural And Legal Form' <http://comlaw.rutgers.edu/crimlawforum/well.html> at p. 2; Chayes in Mason (Ed.) n. 5 at p. 32.

<sup>184</sup> Chayes in Mason (Ed.), n. 5 at p. 29 op cit.

<sup>185</sup> Quoted by Chayes in Mason (Ed.), n. 5 at p. 29.

<sup>186</sup> Cullen et al., n. 3 at p. 2.

<sup>187</sup> Wells, 'Organisational Responses To The Risk Of Criminal Liability' 1995 at p. 3.



Ball and Friedman suggest that the criminal law is, 'more than a set of propositions, more than a moral code, more than a catalogue of rights and wrongs.'<sup>188</sup> One needs to look to the institutions, techniques and mechanisms as well as the assembly of legal rules to appreciate the real essence of the criminal law. It is in those realms that many, not just the Marxist philosophers, find succour for their theories of differential treatment.

Finally, no discussion of criminal law (even the limited one here) can ignore the impact of morality on notions and the development of criminal law. It has been argued that 'criminal law reifies our morality.'<sup>189</sup> It is those perceptions of morality which often underpin or undermine, depending on one's standpoint, the application of the criminal law to corporations. It is the very sense of what is right and what is wrong which dictates in the minds of many that the corporation is a legitimate subject of criminal law. The question whether a corporation can be a moral agent is further addressed below.

The application of the criminal law to corporations though controversial<sup>190</sup> is almost certainly predicated on the basis that it is the unethical behaviour of corporations and a demonstrable inability to regulate themselves that has led to state intervention.<sup>191</sup> Glasbeek talks of the (liberal) consensus theory whereby there is a need to punish even-handedly those crimes identified by society as meritorious of the attention of the criminal law. He explains that,

'Sutherland made visible, a kind of actor, the corporation, whose deviant conduct could not be attributed to any of the casual theories the behavioural sciences had spawned. Once it became recognized that both the incidence and the consequences of corporate deviance were large, the problem for maintaining the appearance of neutrality of the law was real. The possibility had to be faced that a Marxian conflict model of criminal law (positing that it is the coercive force used by the state to suppress

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<sup>188</sup> Ball and Friedman, 'The Use Of Criminal Sanctions In The Enforcement Of Economic Legislation: A Sociological View' 1965 17 Stanford L. R. 197-223 at p. 210.

<sup>189</sup> Seney, 'The Sibyl At Cumae- Our Criminal Law's Moral Code' 1971 17 Wayne L. R. 777-858 at pp. 801.

<sup>190</sup> 'The label crime is a misnomer in the area of economic bureaucracy.' (Ingber, 'A Dialectic The Fulfilment And Decrease Of Passion In Criminal Law' 1975 28 Rutgers L Rev 861 at p. 905).

<sup>191</sup> Clinard, n. 7 at p. 8.

class struggle in order to serve the ruling classes) would become a more plausible analytical framework than a functional/consensus model.<sup>192</sup>

Despite the stereotypical nature of criminal law with its inherent individualism, there is a genuine debate as to whether corporate criminal liability can be accommodated within the confines of the existing law or whether there requires to be developed an entirely new body of law. Andrews recognises that,

‘here as elsewhere in the reform of general principles of the criminal law the difficulty is to decide between a refashioned logical system which will not fit ideally into the existing legislative structure or to go for a system better related to the present legislative structure, which will prolong complexities and illogicalities.’<sup>193</sup>

Scots criminal law, like most others, makes no pretensions to be anything other than individualistic in conception. Instinctively, because of the relative absence of indigenous jurisprudence, one supposes that in approaching corporate criminal liability one may adopt an entirely revolutionary approach. It would nonetheless be naive to make such a supposition. The legitimacy which the criminal law derives from tradition should not be overlooked. Nor can the tangible positive benefits of several hundred years of operation of our criminal law be pushed to one side. The challenge for those seeking a properly developed framework of corporate criminal liability is to develop a framework which is harmonious with the traditions and fundamentals of our criminal law. To do otherwise defeats liberal consensualism and does violation to the principled basis upon which much of the claim for a properly constructed system of corporate criminal liability must rest.

### 1.3 What Is ‘Corporate Crime’ ?

It has been suggested that corporate crime is an unholy marriage of the law of crime and law of corporations and part of the problem of full understanding of the subject of corporate criminal liability lies in the teaching of both subjects.<sup>194</sup> There is often confusion which of the criminal law goals is being deployed in corporate

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<sup>192</sup> Glasbeek, ‘*Why Corporate Deviance Is Not Treated As A Crime- The Need To Make ‘Profits’ A Dirty Word*’ 1984 22 Osgoode Hall L. R. 126-143 at p. 126.

<sup>193</sup> Andrews, n. 9 at p. 96

<sup>194</sup> Coffee, ‘*Corporate Criminal Responsibility*’ in Kadish, *Encyclopaedia of Crime and Justice Vol. I*, (1984) at p. 253.

criminal liability.<sup>195</sup> However, in the view of the writer, corporate criminal liability is somewhat more than a synergy of these two areas of law. Real understanding of its nature requires a sprinkling of psychology, philosophy, penology, criminology and organisational theory. As one commentator has noted 'sensitivity to the relationship between cause and effect is crucial to understanding the phenomenon of organisational illegality.'<sup>196</sup> If understanding the nature of corporate criminal liability is fraught with complexity, there is somewhat more clarity as to its typicality and extent but even these are not limpid clear.

What then is 'corporate crime' ? There is an obvious link between corporate crime and 'white-collar crime.' Clinard and Yeager considered that when Sutherland spoke of 'white-collar crime' he actually meant corporate crime.<sup>197</sup> Sutherland's seminal view of white collar crime was that,

'it generally refers to the illegal and/or socially harmful acts [of omission and commission] engaged in by corporations themselves as legal entities. This definition is not restricted to violations of the criminal law only, but includes any corporate action that could be punished by the state, regardless of whether it is punished under administrative, civil or criminal law.'<sup>198</sup>

Social scientists have since sought to redefine white-collar criminality.<sup>199</sup> There have been attempts to distinguish individual and organisational crimes on the basis of benefit<sup>200</sup> and on the basis of the furtherance of organisational goals.<sup>201</sup> The intrinsic need to benefit the corporation is often emphasised by commentators. Snider defines corporate crime as 'offences committed by corporate officials for their corporation, and offences of the corporation itself,'<sup>202</sup> whereas Hopkins describes it as 'crimes committed by the corporation itself or on behalf of the

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<sup>195</sup> Stoner, 'Corporate Criminal Liability For Homicide: Can The Criminal Law Control Corporate Behaviour' 1985 38 South-Western L. J. 1275-1296 at p. 1286.

<sup>196</sup> Schrager and Short, n. 38 at p. 409.

<sup>197</sup> Clinard and Yeager, n. 7 at p. 13.

<sup>198</sup> Kramer in Wickman and Dailey (Eds.), n. 50 at p. 75.

<sup>199</sup> See Kramer, n. 2 at pp. 16-17; Edelhertz, *White-Collar Crime- An Agenda For Research*, (1970) at p. 3

<sup>200</sup> Clinard and Yeager, n 7 at p. 188.

<sup>201</sup> Schrager and Short, n. 38 at p. 407.

<sup>202</sup> Snider, 'Corporate Crime In Canada: A Preliminary Report' 1978 20 Canadian Journal of Criminology 142-68 at p. 142.

corporation by its employees in furtherance of the corporate interest.'<sup>203</sup> Kramer offers the following definition of corporate crime which seeks to blend the concepts of benefit and organisational goal-

'criminal acts (of omission or commission) which are the result of deliberate decision making (or culpable negligence) by persons who occupy structural positions within the organisation as corporate executives or managers. These decisions are organizationally based- made in accordance with the operative goals (primarily corporate profit) standard operating procedures and cultural norms of the organization- and are intended to benefit the corporation itself.'<sup>204</sup>

Adopting Sutherland's theme, Clinard and Yeager adopt a definition which says more about the extent of corporate crime rather than the nature of that crime. Their view is that,

'A corporate crime is any act committed by corporations that is punished by the State, regardless of whether it is punished under administrative, civil or criminal law. This broadens the definition of crime beyond the criminal law, which is the only governmental action for ordinary offenders.'<sup>205</sup>

Braithwaite's similar formulation is 'conduct of a corporation or of individuals acting on behalf of a corporation that is proscribed and punishable by law.'<sup>206</sup>

Cullen et al. offer a definition of corporate crime as 'illegal acts potentially punishable by criminal sanction and committed to advance the interests of the corporate organization.'<sup>207</sup>

Sutherland accepted that the essential characteristic of crime is that it is behaviour which is prohibited by the State, injurious to the State and against which the State may react, at least as a last resort, by punishment.<sup>208</sup> However, he also suggests that to view only as crime those acts which the courts have determined as criminal has limitations. Tappan, was severely critical of Sutherland's wide view of white-

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<sup>203</sup> Hopkins in Wilson and Braithwaite, n. 139 at p. 214.

<sup>204</sup> Kramer, n. 2 at p. 18.

<sup>205</sup> Clinard and Yeager, n. 7 at p.16. See also Clinard, n. 16 at pp. 9-10.

<sup>206</sup> Braithwaite, 'Enforced Self-Regulation: A New Strategy For Corporate Criminal Control' 1982 80 Michigan L. R. 1466.

<sup>207</sup> Cullen et al., n. 3 op cit. at p. 41; see also Dershowitz, 'Increasing Community Control Over Corporate Crime' 1961 70 Yale Law Journal at p. 281.

<sup>208</sup> Sutherland, *White Collar Crime- The Uncut Version*, (1983) at p. 46.

collar criminality and adopts a more legalistic view of what amounted to corporate crime arguing

‘Only those are criminals who have been adjudicated as such by the courts. Crime is an intentional act in violation of the criminal law..., committed without defence of excuse, and penalized by the state as a felony or misdemeanour.’<sup>209</sup>

Box defines corporate criminal liability as ‘illegal acts of omission or commission of an individual or group of individuals in a legitimate formal organization, in accordance with the goals of that organisation, which have a serious physical or economic impact on employees, consumers..the general public and other organizations.’<sup>210</sup> Most corporate crimes it would seem are those associated with their own businesses.<sup>211</sup> Naturally, there is a symbiotic relationship between objectives and action. The aims and objectives of the corporation might logically offer correlation between the objective desire of the corporation and the criminal act. It is nonetheless difficult to distinguish if the pre-occupation with goals is predicated on the notion of understanding the true nature of corporate crime or, whether the connection is rather with the criminal mind of the organisation. Barnett argues that ‘Corporate crime will occur when management chooses to pursue corporate goals through circumvention of market constraints in a manner prohibited by the state.’<sup>212</sup> Clinard also emphasises the importance of corporate goals in identifying what is corporate crime saying that ‘organizational crime occurs as part of working on behalf of an organization to achieve its goals; it takes place in the course of work by those who participate in the organisation.’<sup>213</sup> Alternatively, it might be claimed that corporate crime amounts to ‘illegal and/or socially harmful behaviours that result from deliberate decision making by corporate executives in accordance with the operative goals of their organizations.’<sup>214</sup>

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<sup>209</sup> Tappan, ‘*Who Is The Criminal ?*’ American Sociological Review-12 (1947) 96-102 reprinted in Geis and Meir (Eds.) (1977), pp. 272-282

<sup>210</sup> Box, *Power Crime And Mystification* (1983) at pp 20-2; see also Schrager and Short, n. 38 at pp. 411-2.

<sup>211</sup> Leigh, n. 4 at p.1512.

<sup>212</sup> Barnett in Wickham and Dailey (Eds.), n. 50 at p. 158.

<sup>213</sup> See Clinard, n. 44 at p. 14.

<sup>214</sup> Kramer in Wickman and Dailey (Eds.), n. 50 at p. 75.

There is often a clear link between corporate crime and organised crime.<sup>215</sup> Nonetheless, Calavita and Pontell emphasise that it is important to differentiate 'organised crime' from 'organisational crime'; that differentiation is on the basis of the purpose and methods and not on the social status of the actors.<sup>216</sup> One can contrast Calavita and Pontell's method of distinction with that of Clinard and Yeager who assert that the distinction is one where crime is committed by the organisation and on the other where crime is committed for personal gain against the corporation.<sup>217</sup> One essential point made by Calavita and Pontell is that 'the line between organized crime and legitimate business is increasingly blurred as organized crime groups "diversify" by entering legitimate businesses and joining the ranks of white collar executives.'<sup>218</sup> Parker whilst distinguishing organizational crime from organised crime recognises there can be something of an overlap.<sup>219</sup> Calavita and Pontell settle on the following distinction defining corporate crime as- 'an illegal act perpetrated by corporate employees on behalf of the corporation'<sup>220</sup> where as 'in organised crime the purpose of the organisation itself is illegal activity for personal gain.'<sup>221</sup>

### Attitudes To Corporate Crime

Several commentators argue that the whole ambit of white-collar crime suffers from public indifference.<sup>222</sup> The extent to which this is true in modern society must be debatable. Naturally, relativity dictates that the public concern for individualised crimes of violence is more acute than their concern for white-collar crime. As has been noted,

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<sup>215</sup> See Guide to RICO, (1986), Fricano; Webster, n. 40 at p. 281; For full discussion of RICO see J. Atkinson, 'Racketeer Influence And Corrupt Organisations' 1978 69 Journal of Criminal Law and Criminology 1; Calavita and Pontell, 'Savings And Loan Fraud As Organised Crime: Toward A Conceptual Typology Of Corporate Illegality' 1993 31 Criminology 519-542

<sup>216</sup> Calavita and Pontell, n. 215 at p. 520; see also Shapiro, 'Collaring The Crime, Not The Criminal: Reconsidering The Concept Of White Collar Crime', 1990 American Sociology Review 363.

<sup>217</sup> Clinard and Yeager, n. 7.

<sup>218</sup> Calavita and Pontell, n. 215 at p. 524.

<sup>219</sup> Parker, n. 177 at p. 518.

<sup>220</sup> Calavita and Pontell, n. 215 at p. 526.

<sup>221</sup> Calavita and Pontell, n. 215 at p. 527.

<sup>222</sup> See for example Cullen, Link and Polanzi, n. 38 at p. 83.



'corporate offenses ..do not have biblical proscription- they lack..the "brimstone smell". But the havoc such offenses produce, the malevolence with which they are undertaken, and the disdain with which they are continued, are all anti-ethical to principles we as citizens are expected to observe.'<sup>223</sup>

Sutherland's earlier thesis that white-collar crime flourishes 'because the community is not organised solidly against that behaviour'<sup>224</sup> may still have some relevance but the lack of organisation cannot be equated with the lack of concern. Other factors are also relevant in the context of the failure to properly respond to corporate crime particularly the policing of white collar crime and the attitudes of the judiciary and juries in dealing with the issue. Rising concern, about white collar crime generally and corporate criminality in particular,<sup>225</sup> is undoubtedly stimulating interest in the legal complexities of the subject. The attempts to develop juristic models, the very public prosecutions and the upsurge in academic writings are stimulating in themselves. Regardless of this there must be recognition that they are reflective of growing public awareness of the nature and extent of corporate wrongdoing. Yoder in the context of America has argued that, '[I]ncreasing numbers of Americans have become aware that crime exists in the suites of many corporations just as surely as it exists in the streets of their cities and suburbs.'<sup>226</sup> Kramer notes that even if there was once a belief that the public were not overly concerned with corporate crime that view point is now no longer sustainable.<sup>227</sup> Earlier American literature and research supports the view that the public are increasingly concerned with corporate crime.<sup>228</sup> Cullen et al. claim however that whilst the public exhibit concern they do not exhibit full understanding.<sup>229</sup>

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<sup>223</sup> Geis in Ermann and Lundman (Eds.), n. 66 at p. 286.

<sup>224</sup> Sutherland, 'White Collar Criminality', 1940 American Soc. Rev 5 Feb. 1-12.

<sup>225</sup> Note evidence of rising concern in Cullen, Link and Polanzi, n. 38 at p. 87.

<sup>226</sup> S. Yoder, 'Criminal Sanctions For Corporate Illegality' 1978 69 Journal of Criminal Law and Criminology 40-58.

<sup>227</sup> Kramer, n. 2 at p. 28.

<sup>228</sup> Schrager and Short in Geis and Stotland (Eds.), n. 129 at p. 26.

<sup>229</sup> Cullen et al., n. 3 at p. 42 et seq.

Consideration of the subject is undoubtedly hampered by the absence of empirical data.<sup>230</sup> In particular, there is a dearth of information about business crimes in Britain.<sup>231</sup> Clinard claims that the paucity of research on corporate illegalities has been due to a number of factors-the lack of experience and appropriate training, in the past it was thought to be difficult to gain access to regulatory enforcement agency data, or to court cases related to corporations, thirdly only limited funds have been available for research in this area.<sup>232</sup> In truth the evidence of corporate crime is extensive but uncollated.<sup>233</sup> It is perhaps impossible to know its real scale.<sup>234</sup> Kelly notes that there is no agency keeping a record of crime committed by corporations and as such, there is 'no indication of the extent of corporate crime that goes unreported or unprocessed.'<sup>235</sup> Fisse similarly notes that empirical studies are in short supply but casts doubt on the what contribution empiricism might make.<sup>236</sup> The absence of large-scale detection of corporate criminal offenders may lie in the earlier explanation by Sutherland who points out that corporation often commit criminal acts which are hard to detect, they victimise weaker groups in society and proof of misconduct is invariably difficult.<sup>237</sup> What we do know is that corporate crime is increasingly global<sup>238</sup> and its scale and nature dwarf individual crime.<sup>239</sup> Those facts alone should give rise to concern.

## The Nature And Impact Of Corporate Crime

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<sup>230</sup> Empirical studies include Miller and Sturdivant, 'Consumer Responses To Society Questionable Corporate Behaviour: An Empirical Test' 1977 4 Journal of Consumer Research 1-7, which addresses whether good behaviour is rewarded in the marketplace.

<sup>231</sup> Leigh, n. 54 at p. 131. Note the conflict between realist theory and fiction theory evident in *Continental Tyre and Rubber Co. Ltd. v Daimler Co. Ltd.* [1916] 2 AC 307 (HL); [1915] 1 KB 893(CA)

<sup>232</sup> Clinard, n. 16 at p. 19.

<sup>233</sup> Wilson and Braithwaite, n. 139 at p. 204.

<sup>234</sup> H. Croall, 'White-Collar Crime- Seams, Cons And Rip-Offs', 1993 Sociology R. 23-26 at p. 26; Measuring fraud even at the most basic level of recorded statistics still provides an incomplete picture (M. Levi, *Regulating Fraud: White-Collar Crime And The Criminal Process*, (1987), at p. 22).

<sup>235</sup> Kelly, 'Corporate Crime- The Untold Story' 1982 US News and World Report at p. 27.

<sup>236</sup> Fisse, 'The Social Policy Of Corporate Criminal Responsibility' 1978 6 Adelaide L. R. 361-412 at p. 366.

<sup>237</sup> Sutherland, *White Collar Crime*, (1949), at pp. 230-3

<sup>238</sup> Stessons, n. 17 at p. 494; Croall, n. 234 at p. 25.

<sup>239</sup> Gruner, n. 12 at p. 8; Geis in Nader and Green, *Corporate Power In America* (1973) at p. 218

The social harm created by corporations takes various forms.<sup>240</sup> Obvious examples are air and water pollution, manufacture and distribution of dangerous consumer products such as mislabelled drugs and contaminated food, and consumer frauds. Less obvious, but no less injurious, are economic crimes such as monopolistic practices, restraint of trade, unfair trade practices, and the improper use of corporate funds. Here the social harm is of less direct social impact, but injurious in both the economic and political sense. Clinard and Yeager categorise 6 types of illegal behaviour- administrative, environmental, financial, labour, manufacturing and unfair trade practices.<sup>241</sup> Other major examples of corporate offending include corporate bribery,<sup>242</sup> illegal restraint of trade, such as illegal price fixing, fraud in government contracts, submitting fraudulent data to government agencies, unfair labour practices, false advertising, bribery, illegal kickbacks, unsafe working conditions, violations of laws protecting consumers, violations of laws protecting the environment, and income tax evasion.<sup>243</sup> According to one study by Parker, 70-75% of offences in the American federal courts are for anti trust fraud or other property crimes; 20-25 % are for regulatory crimes predominantly environmental offences; organisational crimes of violence 'are virtually non-existent.'<sup>244</sup> The veracity or accuracy of this statement must be doubted as a simple misconception or misdiagnosis of the concept of crimes of violence, Elkins explains that,

'Corporate criminal activities and individual criminal conduct are alike in that each creates an endangerment to safety, health, and financial well-being. Corporate crimes are distinguishable from individual criminal conduct chiefly in terms of social impact. Higher consumer costs, increased pollution, and more frequent physical injuries emanating from corporate activities result in societal harm far in excess of the harm caused by individuals criminals.'<sup>245</sup>

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<sup>240</sup> Elkins, n. 5 at p. 74.

<sup>241</sup> Clinard and Yeager, n. 7 at p. 113; see also *US v Yellowcab Co.* 322 218: 67 S. Ct. (1960); *Kieffer-Stewart Co. v Joseph Seagram Inc.* 340 US 211, 71 S Ct. 259 (1951)

<sup>242</sup> See Clinard, *Corporate Corruption: The Abuse Of Power*, (1990) at pp. 121-135.

<sup>243</sup> Clinard, n. 242 op cit. at p. 14; Seney, n. 189 at pp. 801-3, attempts to draw the distinction between the harm of white collar crimes and street crimes based on their respective estimated financial costs. Fear of street crime is still greater. (Goff and Reasons, n. 161 at p. 13) Corporate crime more destructive. (Goff and Reasons, n. 161 at p. 15; Kramer in Wickman and Dailey (Eds.), n. 50 at pp. 76-77) The assumption of psychological abnormality is just as invalid for suite criminals (Goff and Reasons, n. 161 at p. 20) Contrast of cost of street crime property offences and fraud betrays a gross imbalance (see Levi, 'Taking Financial Services To The Cleaners' 1995 145 N. L. J. 26-27).

<sup>244</sup> Parker, n. 177 at p. 521-2.

<sup>245</sup> Elkins, n. 5 at p. 75.

Conyers notes that the victims of such crime are public, government and business and that the costs cannot be simply measured in financial figures. The figures that are available are 'staggering.'<sup>246</sup> It is estimated that in 1991 the total cost of white-collar crime in America was \$261.06 Billion.<sup>247</sup> Kramer talks of the infliction of enormous economic costs 'and death and injury for thousands' through corporate wrongdoing.<sup>248</sup> He divides the costs of corporate crime into three groupings- the economic costs, the physical costs, and the social and moral costs. An American Senate Sub-committee put the cost of corporate crime at somewhere between \$174b and \$231b while the American Chamber of Commerce estimates the cost in region of some \$40b per year.<sup>249</sup> Conklin simply states that 'the costs of business crime are pervasive and exorbitant.'<sup>250</sup>

The physical costs are equally obvious; thousands are killed each year by acts of corporate crime. Physical harm may be acute or chronic.<sup>251</sup> (See chapter 5 of this thesis) As Kramer points out these physical costs far outweigh the physical costs of what he calls the street crimes of the poor.<sup>252</sup> The most obvious evidence of physical costs arising out of corporate crime are to be found in the statistics for workplace deaths and injuries but the workplace clearly is not the only place where physical harm is occasioned. Environmental damage by corporations represents a significant contribution to the overall physical costs.<sup>253</sup> Incidents such as Bhopal on India are striking examples of the physical damage that can occur. Kramer also highlights the damage done to consumers. His statistics for America point to a staggering 20 million serious injuries being caused by defective consumer

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<sup>246</sup> J. Conyers, 'Corporate And White-Collar Crime- A View By The Chairman Of The House Sub-Committee On Crime' 1980 17 American Criminal L. R. 287-300.

<sup>247</sup> M. Ewall, 'The Hidden Crime And Violence In Corporate America' 1996 [http://www.envirolink.org/orgs/fcg/mediawatch/collegian/corp1.htm\(5km\)](http://www.envirolink.org/orgs/fcg/mediawatch/collegian/corp1.htm(5km)). 6,000 times the amount stolen in Bank robberies and 11 times less than cost of thefts that year

<sup>248</sup> R. Kramer, 'Criminologists and the Social Movement Against Corporate Crime' 1989 16 Social Justice 146-164 at p. 146.

<sup>249</sup> See Snider, n. 10 at p. 19.

<sup>250</sup> Conklin, *Illegal But Not Criminal: Business Crime in America* (1977), at p. 2

<sup>251</sup> Schrager and Short, n. 38 at p. 413.

<sup>252</sup> Orland, n. 1 at p. 19.

<sup>253</sup> Schrager and Short, n. 38 at p. 415.

products.<sup>254</sup> It was estimated in America that there are 28,000 deaths and 130,000 serious injuries to consumers arising from dangerous products. Naturally, such figures cannot be directly attributed to illegality. Probably more significant than the two large societal groupings of workers and consumers, is the threat to the general public. Cullen says that 'Participants in a corporate society need not produce or consume goods to risk victimisation by corporate violence. Each day, business practices occur that endanger the lives of the general public.'<sup>255</sup> In a similar graphic depiction of the impact of one form of corporate crime, a *Time Magazine* editorial noted that,

'Natural disasters and wars do their damage spectacularly and quickly-shaking, crushing, burning, ripping, smothering, drowning. The devastation is plain; victims and survivors are clearly distinguished, causes and effects easily connected. With the unnatural disasters caused by environmental toxins, however, the devastation is seldom certain or clear or quick. Broken chromosomes are unseen; carcinogens can be slow and sneaky. People wait for years to find out if they or their children are victims. The fear, the uncertainties, and the conjectures have a corrosive quality that becomes inextricably mingled with the toxic realities.'<sup>256</sup>

Cullen et al. note the response to a 1980 Fortune survey which disclosed that a surprising number of American corporations had been involved in 'blatant illegalities'<sup>257</sup> and that 'The most distinctive feature of corporate crime is that it is organised, not individualistic.'<sup>258</sup> As Sutherland recognises, the thesis that corporate crime is organised does not preclude the contention that corporations never commit crimes inadvertently.<sup>259</sup> In fact there is every reason for presupposing that much of corporate crime is rooted in negligence and inadvertence. Sutherland's seminal work challenged the notion that criminality was essentially a lower class phenomenon. In Sutherland's sample 60% of corporations had been convicted in the criminal courts and had an average of four convictions each.<sup>260</sup> The other major empirical study is that undertaken by Clinard

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<sup>254</sup> Kramer, n. 2 at p. 20; Cullen et al., n. 3 at p. 71

<sup>255</sup> Cullen et al., n. 3 at p. 75.

<sup>256</sup> *Time Magazine* 1984 Vol. 124 No 25 December 17th pp. 6-23; See Nader (1970, pp. vii-viii) who talks of pervasive violence

<sup>257</sup> Cullen et al., n. 3 at p. 3 - 11 % had committed one major delinquency

<sup>258</sup> Cullen et al., n. 3 at p. 40.

<sup>259</sup> Sutherland, n. 237 at p. 239.

<sup>260</sup> Sutherland, n.237 at p. 23.



and Yeager which points to an equally high incidence of criminal activity amongst American corporations. They concluded that their figures were ‘only the tip of the iceberg of total violations.’<sup>261</sup> There are naturally inherent dangers on relying on available statistics not least in the fact that they do not reveal the “hidden delinquency” of corporations.<sup>262</sup> Cullen et al. argue that subsequent studies, though more limited in scope [than Clinard and Yeager’s, and Sutherland’s] reinforce the view that law and order have yet to be established in the business community.<sup>263</sup> The tabulation of recorded crime should perhaps be the starting point for determining the actual extent of crime.<sup>264</sup> They recognise that the increased media attention for the subject may be distorting the perception of the problem’s prevalence.<sup>265</sup> The problem may not be escalating but rather it is being highlighted more than previously. For all this, Cullen et al still offer the *crie de coeur* that ‘We cannot afford to neglect the capacity of corporations, the most powerful actors in society, to victimize society.’<sup>266</sup> Like other writers, Cullen et al. sub-divide the costs of corporate crime into economic, social and physical costs. Obsession with the economic cost of corporate crime must be tempered with the realisation that ‘The tremendous impact of corporate lawlessness results in part from the extensive involvement of business in unlawful activities, but it is also due to the reality that the costs of even a single corporate offense are often immense.’<sup>267</sup> Wheeler and Mitchell similarly point out that,

‘just as the organizational form has facilitated economic and technological development on a scale far beyond that achieved by individuals, so that form has permitted illegal gains on a magnitude that men and women acting alone would find hard to attain.’<sup>268</sup>

Another, almost intangible ‘cost’ of corporate crime is the damaging impact it has on the capitalist system which inexorably relies on public confidence. Corporate crime can readily and perceptibly undermine the very foundation of the system.

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<sup>261</sup> Clinard and Yeager, n. 7 at p. 111.

<sup>262</sup> Cullen et al., n. 3 at p. 51.

<sup>263</sup> Cullen et al., n. 3 at p. 51.

<sup>264</sup> Orland, n. 1 at p. 508.

<sup>265</sup> Cullen et al., n. 3 at p. 52.

<sup>266</sup> Cullen et al., n. 3 at p. 54.

<sup>267</sup> See Wheeler and Rothman, ‘*The Organisation As A Weapon In White Collar Crime*’ 1982 8 Michigan Law Review 1403-1426 at pp. 1413-19.

<sup>268</sup> Wheeler and Rothman, n. 267 at p. 1426.



The social and moral costs identified by Kramer essentially revolve round the corrosive impact that corporate crime has in public confidence in the commercial world. Conklin postulates that this impact is more significant than the physical and economic costs but such a view must of course be subjective.<sup>269</sup> Sutherland himself argued that 'The financial cost from white collar crime, great as it is, is less important than the damage to social relations.'<sup>270</sup> There is every reason to support the proposition that corporate crime impacts upon the moral climate of society.<sup>271</sup> Cullen et al. also counsel against focusing in on purely economic costs of corporate crime. Their concern is for social fabric of society rather than capitalism *per se*.<sup>272</sup> Whilst such criminality has the capacity to erode public confidence in the economic system and to threaten the moral foundations of our society, arguably, it might also act as a justifications for engaging in crime for lower social orders or indeed individuals generally.<sup>273</sup>

Wheeler and Rothman suggest that the corporation is to the white collar criminal what the knife or gun is to the common criminal- a toll to obtain money from victims.<sup>274</sup> Those who commit crime under the 'aegis of an organisation are able thereby to commit crimes of greater sophistication, complexity, and magnitude.'<sup>275</sup> Clinard and Yeager's study referred to *supra*, *inter alia* found that consequences of a single corporate violation can be enormous and can be far more significant than an ordinary crime. In their view, the undercount of corporate crime may be as high as a quarter or a third;<sup>276</sup> Incidences of multiple violations and recidivism,<sup>277</sup> and that violations are more likely by large corporations.<sup>278</sup> The capacity for harm by corporation cannot be 'overstated.'<sup>279</sup> The power of large corporations is awesome to the extent that it can be said,

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<sup>269</sup> Conklin, n. 250 at p. 7

<sup>270</sup> Sutherland, n. 237 at p. 13.

<sup>271</sup> Clinard and Yeager, n. 7 at p. 11.

<sup>272</sup> Cullen et al., n. 3 at p. 64.

<sup>273</sup> Cullen et al., n. 3 at p. 65.

<sup>274</sup> Wheeler and Rothman, n. 267 at p. 1406 op cit.

<sup>275</sup> Wheeler and Rothman, n. 267 at p. 1422.

<sup>276</sup> Clinard and Yeager, n. 7 at p. 112.

<sup>277</sup> Clinard and Yeager, n. 7 at pp. 116-7.

<sup>278</sup> Clinard and Yeager, n. 7 at p. 118.

<sup>279</sup> C. Wells, 'The Corporate Manslaughter Proposals: Pragmatism, Paradox And Peninsularity', 1996 Criminal L. R. 545 at p. 546.

‘far too many giant corporations have abused this power in their relations with their workers, their stockholders, their consumers, and the public at large. They have also abused our environment, defrauded the government, and exploited the developing nations of the Third World. In their actions, they have even abused the very democratic process that has given them the opportunity to achieve this power.’<sup>280</sup>

We need no more justification than this to implore the application of criminal law to corporations as an essential control mechanism on their malevolent power.

### **Is The Corporation Capable Of Committing Any Crime ?**

There is a view amongst many jurists that corporation cannot commit certain crimes which they believe are the sole preserve of human actors. For example, one commentator has argued that, ‘corporations cannot be bigamists or rapists,’<sup>281</sup> but the fact that they do not have the capacities needed to commit those crimes has no general effect on their status vis a vis the criminal law *per se*.<sup>282</sup> Leigh argues that there are some exceptions to the list of crimes with which a company can be charged.<sup>283</sup> Whilst Tigar suggests the limitations on types of crimes attributable to a corporation are ‘arguable’,<sup>284</sup> Elkins posits that ‘The imposition of criminal liability has no inherent limitations once the conceptual barriers are surmounted. As a juristic person a company is capable of committing almost any criminal offence.’<sup>285</sup> But for all that it is widely held that certain crimes are outside the ambit of corporate crime.<sup>286</sup> Writing in 1966, Mr Justice Gowans claimed that ‘It is clear that a company is not immune from criminal liability, and it is now clear that it may commit an offence involving *mens rea*. It cannot commit crimes of certain kinds, as is obvious. It cannot commit the crime of perjury or of bigamy or of murder.’<sup>287</sup> Meuller notices that the offences which a corporation could not be

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<sup>280</sup> Clinard, n. 44 at p. 1.

<sup>281</sup> Leigh, n. 54 at p. 7 suggests that rape might not be excluded from the crimes corporations might commit.

<sup>282</sup> P. French, *Collective and Corporate Responsibility* (1979) at p. 174.

<sup>283</sup> Leigh, n. 54 at p. 259.

<sup>284</sup> Tigar, n. 42 at p. 215.

<sup>285</sup> Elkins n. 5 at p. 124

<sup>286</sup> Note: ‘*Criminal Liability Of Corporations For Acts Of Their Agents*’, (1946) Harvard Law Review at p. 284

<sup>287</sup> Gowans, ‘*Some Experience In Criminal Trials In Relation To Company Offences*’ 1966 Australian L. J. 328-37 at p. 330.

guilty of have declined<sup>288</sup> whilst suggesting that there is no good reason why a corporation should not be guilty of murder.<sup>289</sup> Whilst the theoretical basis of the assertion that corporations cannot commit certain crimes may be thin, on a practical level those who exclude certain crimes from the sphere of corporate criminal liability indicate a common-sense approach. Accordingly, we should accept that bigamy cannot be committed by a corporation<sup>290</sup> and that a corporation cannot be guilty of incest.<sup>291</sup> Leigh suggests that a corporation may be an accessory to those crimes thought theoretically impossible to attribute to the company.<sup>292</sup> There is a view that holds that convicting companies of the same offences, established in the same way as those committed by individuals, is the best route to emphasising the seriousness of the crime and expressing the appropriate degree of censure.<sup>293</sup> Even the holder of that view accepts that there is a rapidly diminishing category- rape, bigamy and perjury- which should be excluded.<sup>294</sup> It is in this respect that the liberal consensualist argument partially comes unstuck. Equality of treatment sits at the heart of the desire to arraign all criminal offences against the corporation. However it does no real violence to the case for corporate criminal liability to concede that equality of treatment need not mean identical treatment. Criminal law in various instances excludes certain social actors from particular crimes. The exclusion of the corporation from particular crimes should, on that basis, pose us little concern. Indeed the outline model I seek to develop in chapter 6 concedes this very point.

#### 1.4 History Of Corporate Criminal Liability

It has been suggested that the concept of corporate criminal liability developed in the common law countries from small and obscure beginnings and that the development lacked any conscious or overall direction. Most academic commentators point to a historical reluctance to prosecute corporations. Wells, for

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<sup>288</sup> Meuller, 'Mens Rea And The Corporation' 1957 19 University of Pittsburgh L. R. 21-48 at p. 22.

<sup>289</sup> Meuller, n. 288 at p. 23.

<sup>290</sup> Law Commission, *Criminal Law: Involuntary Manslaughter- A Consultation Paper*, No 135 para 4.21, p. 97.

<sup>291</sup> H. J. Laski, 'The Personality Of Associations' 1916 29 Harvard L. R. 404-26 at p. 414.

<sup>292</sup> He cites rape, bigamy, procurement of an abortion by self administration of a drug.

<sup>293</sup> See Edgerton, 'Corporate Criminal Responsibility' 1927 36 Yale Law Journal 827-844 at p. 827

<sup>294</sup> See also Law Society Working Papers 44 (1972) para 37

example, suggests that, '[S]trong resistance within the legal system to the notion of corporations as criminals has resulted in an under-developed jurisprudence of corporate liability for crime.'<sup>295</sup> Because of this, the history of corporate liability is haphazard and incoherent.<sup>296</sup> Much of the peripathetic development can naturally be viewed as integral to the development of the modern corporation. In truth the historical development of corporate criminal liability in the Anglo-American jurisdictions involves a chronology not just of changing times but a see-sawing back and forth across continents.<sup>297</sup>

Maitland argued that the early corporations could neither commit civil or criminal wrongs.<sup>298</sup> Other commentators however, argue that it was always recognised that corporations could be criminally liable for their employees' wrongdoings.<sup>299</sup> What seems beyond doubt is the link between civil liability and criminal liability for wrongdoing. Despite this link, criminal liability was much slower to gain recognition and acceptability than civil liability.<sup>300</sup> Certainly, before the advent of corporations employers were invariably liable for the actions of their servants though, this vicarious liability (both civil and criminal) eroded in the medieval period.<sup>301</sup> Initially corporations were not thought to have any criminal liability due to the absence of recognition of their juristic personality and, a belief that because they were inanimate entities they could not give commands or consent. The first known form of corporate criminal liability related to local government being held criminally liable for creating a public nuisance where their officials had failed to maintain highways. That these early developments should take place in England, as the seat of the Industrial Revolution, is of little surprise. Equally, unsurprising is the fact, given the exportation of culture, concepts, and people, that

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<sup>295</sup> Wells, n. 5 at p. 551.

<sup>296</sup> Wells, n. 5 at p. 558.

<sup>297</sup> Bernard, 'The Historical Development Of Corporate Criminal Liability' 1984 22 Criminology 3-15 at p. 3.

<sup>298</sup> Maitland's translation of Gierke's, *Political Theories Of The Middle Ages*, n.104

<sup>299</sup> Hitchler, 'The Criminal Responsibility Of Corporations' 1923 27 Dickinson Law R. 89-119.

<sup>300</sup> Bernard, n. 297 at p. 5.

<sup>301</sup> Bernard, n. 297 at p. 5.

developments in corporate criminal liability should also take place in America.<sup>302</sup> Bernard reveals instances at the turn of the 18th Century of prosecutions against private business corporations charged with undertaking public functions.<sup>303</sup> The linear chain from the earlier imputation of criminal liability to public corporations in England is relatively obvious. It was hardly a quantum leap for the American courts to attach criminal liability for public nuisance when hitherto, in England, public corporations had faced similar prosecutions. Both were carrying out similar functions; both entities were corporate in form. Some one hundred and forty years on from these American prosecutions, analogous prosecutions of private corporations in England took place. Bernard explains the delay in following the American experience on the continued reliance of the public sector municipalities to provide the services that private concerns had supplied in America and, secondly in the growth of the attribution of individual blame to particular officials.<sup>304</sup>

In England the development of corporate criminal liability into the private sector is often attributed to advent of the railroad.<sup>305</sup> Private railway companies were chartered to construct and operate railway services. They represented the first instances of private enterprises operating what had been hitherto public function. Inevitably there was comparison with the early American private organisations providing municipal services. In *R v Birmingham and Gloucester Railway Company*,<sup>306</sup> the railway company had been incorporated by statute with a view to providing railway facilities. The statute obliged the company to build bridges over land divided by railway track. This obligation in the statute was placed upon the corporation rather than any individual. The prosecution argued that, whilst the company might not be liable for 'misfeasance' (an action violating the statute), they could be liable under the statute for 'non-feasance.' This view appears to have been supported by the court.

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<sup>302</sup> For a historical perspective of corporate criminal liability in America see Brickey, 'Corporate Criminal Accountability: A Brief History And An Observation' 1982 60 Washington University L. Q. 393-423 at p. 404.

<sup>303</sup> Bernard, n. 297

<sup>304</sup> Bernard, n. 297 at p. 6-7.

<sup>305</sup> Wells, n. 5 at p. 559

<sup>306</sup> (1842) 3 QB 223

The distinction between 'non-feasance' and 'mis-feasance' was displaced only four years later in a prosecution of the *Great North Eastern Railway Company*<sup>307</sup> who were charged with the offence of laying their tracks over a public highway to the destruction of that highway. The defence sought to argue that a corporation could not be criminally liable for a positive action (presumably on the basis that only individuals could). This contention was rejected and in the process the decision in *R v GNER* disappplied the distinction between misfeasance and non-feasance. The position in England and America harmonised following the decision in the *State v Morris and Essex Railroad Co.*<sup>308</sup> Both countries thereafter prosecuted companies for positive acts as well as omissions.<sup>309</sup> Bernard suggests that there was a certain inevitability about these developments in corporate criminal liability.<sup>310</sup> Essentially, he argues that it was no longer tenable to maintain a spurious distinction between the public corporation providing public services and the private corporation providing essentially the same services. Equally, he argues that the distinction of liability for positive actions and negative actions was similarly untenable. These early cases operated to assert that the company was 'a primary repository of legal rights and duties'<sup>311</sup> and, 'The English courts, in imposing liability for nuisance, plainly desired to curb giant repositories of economic power.'<sup>312</sup>

The absence of the ability to attach intention to corporations clearly had an extremely limiting effect on the extent of corporate criminal liability. It was not until the early 1900s that the courts finally accepted that corporations were capable of intent. In America the first such case was *New York Central and Hudson River Railroad Co. v United States*<sup>313</sup> where the company were charged with a breach of the Elkins Act which sought to ban the giving of rebates to sugar companies for

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<sup>307</sup> (1876) 2 QBD 151

<sup>308</sup> CO 23 NJL 360 (1852).

<sup>309</sup> Bernard, n. 297 at p. 8.

<sup>310</sup> Bernard, n. 297 at p. 8.

<sup>311</sup> Leigh, 'The Criminal Liability Of Corporations And Other Groups' 1977 9 Ottawa L. R. 247-302 at p. 249.

<sup>312</sup> Leigh, n. 311 at p. 251.

<sup>313</sup> 212 US 481 (1909)



shipping their goods on particular railroads. The Act had a provision which in effect made the company liable for the actions of the employee. In determining the case the court clearly saw the inconsistency of simply punishing the individual for something of direct benefit to the company. There was clear legislative intent to punish the company and the court argued that they could see

‘no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has instructed authority to act in the subject matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act.’

Some four years after *New York and Hudson River Railroad v United States*, a case in England similarly held that a corporation could have intention. As Bernard contends ‘Once it was accepted that criminal intention could be attributed to a corporation through the intent of its agents, it was only a question of working out precisely which agents could be considered to act and to intend for the corporation.’<sup>314</sup> *Moussell Bros. Ltd v London and North-Western Railway Company*<sup>315</sup> was in all respects a landmark decision in the development of corporate criminal liability. In this case Atkin LJ argued that,

‘..while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such terms as to make the prohibition or duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom in ordinary circumstances it would be performed, and the person upon whom the penalty is imposed.’

This statement offered a test to determine whether corporate criminal liability would exist but it was not this test which was applied in subsequent cases to imply intent to the corporation. In *Chuter v Freeth and Pocock Ltd.*,<sup>316</sup> Alverstone CJ accepted that the company could ‘believe’ or ‘not believe’ certain statements in the

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<sup>314</sup> Bernard, n. 297 at p. 10.

<sup>315</sup> [1917] 2 KB 836

<sup>316</sup> [1911] 2 KB 832

warranty. As Heerey suggests implicit in such a recognition is the fact that the company has a state of mind<sup>317</sup> and, if it could have a state of mind it could have a similar state of mind to individual actors.<sup>318</sup> Wells suggests that in the period 1870-1930 that *mens rea* was not regarded as particularly problematic and that the key issue was whether the offence fell into the category of 'real' crime.<sup>319</sup> Post-1930 the criminal mind has become a predominant issue. An issue of such relevance that the problems it creates has led to 'solutions' which have 'trailed' the subject, certainly in Britain, into the mire of further inconsistency and incoherence.

This potted chronology of the development of corporate crime is almost entirely rooted in the common law jurisdictions. The absence of similar developments in the civil law jurisdictions is explained by Bernard in various ways. First, he argues that the nuisance offences which represented the starting points of corporate crime had no direct parallel in civil law jurisdictions. The decentralisation of government functions is also identified as a contributing factor. Moreover, the civil law countries had not embraced the concept of the juristic person but rather saw companies as combinations of individuals. Finally, he points to a tradition of judicial interpretation in the common law countries. The absence of written or codified law in the common law countries offered the judiciary considerable scope for judicial activism. The development of vicarious liability and its cross fertilisation into criminal law undoubtedly was also a major contributing factor in the development of corporate criminal liability.<sup>320</sup> In the Anglo-American jurisdictions where liability did attach to the corporation it was invariably based on the premise of vicarious liability for the wrongdoing of servants of the organisation. Leigh offers the view that 'until the advent of vicarious liability there was no basis upon which the positive acts could be imputed to corporations.'<sup>321</sup> In the early days of corporate enterprise such a model of corporate liability had both intellectual appeal and merit. Corporations were smaller; the control mechanisms

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<sup>317</sup> Heerey, n. 16 at p. 678.

<sup>318</sup> Cf. *Pearks, Gunston and Tee Ltd. v Ward* [1902] 2 KB 1; see also *Citizens Life Assurance Co. Ltd. v Brown* [1904] AC 423(PC)

<sup>319</sup> Wells, n. 5 at p. 558.

<sup>320</sup> Bernard, n. 297.

<sup>321</sup> Leigh, n. 311 at p. 247.

were stronger. In the early corporations linear command structures were more evident whereas today's corporations exhibit a far greater degree of bureaucracy. The size and scale the early corporate entities is also significant in this regard. Entrepreneurs exhibited a greater degree of control over their organisations and indeed, were often an integral part of the operations that the organisations undertook. The modern phenomenon of the distant, remote director influencing matters from afar was hardly the widespread practice that it is now.

The developments evoked by the Industrial Revolution in Britain may have had a cathartic effect on the development of corporate criminal liability but, as becomes apparent from any study of the subject, developments in other parts of the world also have much significance. Despite the limitations and perceived reluctance of the legal response to the issue of corporate crime, one can trace a succession of cases where prosecuting authorities and courts have sought to respond to corporate wrongdoing by applying the criminal law. Despite the principle that corporations were not criminally liable, being "whittled down" throughout the 19th century,<sup>322</sup> the application of 'conventional' crimes to corporations continued and indeed continues to prove troublesome. Gobert rails that,

'[T]he attempt to apply conventional criminal law to companies has not been a resounding success. This was perhaps predictable, as the relevant rules and doctrines had been developed in cases involving human defendants. Their transportation to an inanimate organisational entity such as a company was never going to be easy. Not only did the judges fail to rise to the challenge, however, they managed to construe the relevant law in a regressive manner that has all but insulated large companies from criminal liability.'<sup>323</sup>

Gobert also suggests that the failure of the judiciary to respond to the problem had resulted in Parliament responding by 'filling gaps' with regulatory offences (but with limited impact).<sup>324</sup> The growth in size, nature and number of corporations meant that inevitably corporate criminal liability 'was destined to be reconsidered by the courts.'<sup>325</sup> There was a dichotomy between the law's commitment to

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<sup>322</sup> Heerey, n. 16 at p. 677.

<sup>323</sup> Gobert, n. 18 at p. 393.

<sup>324</sup> Gobert n. 18 at p. 393; See Miller in Nader and Green (Eds.), n. 239 at p. 205

<sup>325</sup> Elkins, n. 5 at p. 88.



individual responsibility and the emergence of the corporate entity.<sup>326</sup> Whilst companies were dominated by one person the problem was not that acute. The expansion and proliferation of corporations created a significant problem.<sup>327</sup> As a consequence, one finds repeated and diverse attempts to expand the criminal law to embrace the new corporations. That dynamic evolutionary process continued to evince difficulties throughout the 20th century and indeed continues to do so until the present date.<sup>328</sup>

In America the development followed similar, if distinct, lines. The early corporate forms were the public corporations. By the 18th Century private corporations were evident and co-existing with the public corporations. As in England it was neglect of statutory duty which led to the development of criminal liability for corporations. In America they proceeded beyond liability for public corporations to private enterprise. Elkins explains why this is so when he points out the American position,

‘appeared before the English courts had firmly established the liability of English corporations beyond public nuisance and the American courts did not, therefore, have benefit of a settled rule of English common law.’

Even in America at this time there were a number of early decisions which pointed to the absence of criminal liability for corporations but Elkins claims that this approach was never adopted by a majority of jurisdictions.<sup>329</sup> The common law was not the only cathartic force; legislative enactments in both jurisdictions provided opportunities for expansion of criminal liability to corporations. America also adopted the original schism of non-feasance and mis-feasance and, in similar fashion to England, both became merged.<sup>330</sup> Elkins points out that like the English

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<sup>326</sup> Swigert and Farrell, n. 49 at p. 164.

<sup>327</sup> ‘Malfeasance’ is defined in Black’s Law Dictionary (5th Ed., 1979) p. 862 as ‘a wrongful act which the actor has no legal right to do, or any wrongful conduct which affects, interrupts or interferes with performance of official duty, or an act for which there is no authority or warrant of law or which a person ought not to do at all, or the unjust performance of some act, which [the] party performing it has no right, or has contracted not, to do. Group non feasance can be found as early as 17th Century (Leigh, n. 54 at p. 16).

<sup>328</sup> Winn, ‘*The Criminal Responsibility Of Corporations*’ 1929 3 Cambridge L. J. 398.

<sup>329</sup> Elkins, n. 5 at p. 90.

<sup>330</sup> *State v Morris and Essex Railroad* CO 23 NJL 360 (1852); *Commonwealth v Proprietors of New Bedford Bridge* 68 Mass (2 Gray) 339 (1854).

pattern the early American decisions imposing criminal liability for misfeasance expressly declined in *dicta* to impose liability on corporations for crimes requiring intent.<sup>331</sup>

Nothing has so far been said of corporate formation in Scotland essentially because little material is available and because development of the corporation has been a universal phenomenon. Walker notes statutory provision for incorporation in 1856.<sup>332</sup> St Clair and Drummond Young explain that prior to this commercial activity was confined to solitary entrepreneurialism and partnerships.<sup>333</sup> The convergence of English and Scottish company law render separate treatment superfluous. Scottish law has shown a remarkable propensity to follow rather than lead. A situation that prevails until the present day. It is only in how the criminal law responds to corporations that Scots law displays any cultural lag. Our common law history is bereft of any real chronology of development. The issue has simply been ignored until relatively recent times. A fuller treatment of the limited authorities is attempted in chapter 6.

### **1.5 Corporate Personality**

One of the attendant problems of corporate criminal liability lies in the fact that in endeavouring to ascribe criminal liability jurists have approached the task with the intent to ascribing criminal liability to the corporation as a juristic person. The personification of the corporation has satisfied the individualistic thirst of the criminal law and has rationalised the application of laws developed for the individual to the corporate form. For some the extent of that problem has been overstated. One commentator has been moved to say,

‘We find over and over again that the problems which have given rise to the greatest controversies attain front rank in their particular science simply through having been the object of so much learned thought even if their intrinsic merit does not justify the importance attached to them. It

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<sup>331</sup> Elkins, n. 5 at p. 95.

<sup>332</sup> See Walker, *Principles Of Scottish Private Law* vol. 1 (1975) at p. 434

<sup>333</sup> St Clair and Drummond Young *The Law Of Corporate Insolvency In Scotland* W Green (1988) at p. 2



may be that the question of the nature of juristic persons is among these.<sup>334</sup>

There are three approaches to the juristic personality issue- firstly, only single individual citizens can have rights and duties; secondly, the realist theory, and finally, the fiction theory.<sup>335</sup> Those who eschew all attempts to confer personhood on corporations view the corporation as ,

‘a shorthand term for groups of men, physical properties and the manifold investor, employee, supplier, manager, banker, etc. relations which untie these men and properties for certain ends. To think of the men or properties as abstractions apart from the attributes implicit in these relationships is to postulate an attributeless substance, and to conjure up a corporate entity that, being no aid to edification, has no real case for existence.’<sup>336</sup>

Moreover, they adopt the view that ‘it is implausible to treat a corporation as a member of the human community, a member with personality, intentions, relationships responsibility but no conscience, and susceptibility to punishment.’<sup>337</sup> This nominalist approach views corporate personality as nothing more than collectivities of individuals.<sup>338</sup> Corporate personality is accordingly derivative and as such liability should be individualistic. In modern era there has been a tendency to identify personhood with the possession of will and equate it with a single human life.<sup>339</sup>

### The Realist Perspective

The ‘realist’ perspective was most cogently advanced by Gierke who viewed incorporation as declaratory. Gierke’s work is based on the old Germanic reality

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<sup>334</sup> M. Wolff, ‘On The Nature Of Legal Persons’ 1938 54 Law Q. R. 494-521 at p. 494.

<sup>335</sup> A. Vincent, ‘Can Groups Be Persons’ 1989 42 Review of Metaphysics 687-715 at pp. 705-7.

<sup>336</sup> Timberg, ‘Corporate Fictions - Logical, Social And International Implications,’ 1946 45 Columbia L. R. 533-580 at p. 548.

<sup>337</sup> E. Wolgast, *Ethics Of An Artificial Person*, (1992), at p. 86.

<sup>338</sup> Colvin, ‘Corporate Personality And Criminal Liability’ 1995 6 Criminal Law Forum at p. 1.

<sup>339</sup> ‘Persons can make intelligent choices and act responsibly..they can act rationally. They are self conscious, aware of their own mental processes, and possess a sense of past, present and future. They can consciously articulate values, interests, and purposes, and can determine their own behaviour and cite reasons for their actions. Some add to this the ability to formulate conceptual thoughts and to articulate them in language. It is also often argued that the person must be embodied.’ Vincent, n. 335 at p. 701.



theory- *Genossenschaftstheorie*- which views the corporate body as a real person. According to Gierke, the corporation is a real living force of historical and social action.<sup>340</sup> The State function is to recognise its existence not create it. Teubrier is critical of Geirke's approach to the collective claiming that,

'Geirke's cardinal error was to conceive of the components of the association as flesh and blood people. When he called associations "organisms whose parts are human beings" he programmed the errors of organicist collectivism. Not only does this entail difficulties for the treatment of institutions, foundations and one man companies, but by taking actual human beings as essential elements of an association, it bars access to the social reality of associations, for collectivises can only then be seen as "supermen"'.<sup>341</sup>

In support of the realist approach it is argued that 'Groups possessing the attributes of corporations existed before their 'creation' by charter or statute. Corporations, instead of being creations of the law, actually compelled the law to recognize them.'<sup>342</sup> A realist perspective would assert that rejection of the fiction theory is simply a rejection of 'an untrue account of the reality with which the practical lawyer has to deal with.'<sup>343</sup> Anderson claims that,

'Corporations are indeed as real as their impact on society demonstrates. They are a composition of individuals working as a finely-tuned group, the conduct of which can be vastly different when acting in a collective capacity than in the capacity of individuals.'<sup>344</sup>

Realists perceive that groups are natural but not biological entities.<sup>345</sup> Moreover, the reality theory views corporations as pre-legal existing sociological persons; the law cannot create but can determine which entities it recognises. This conferment of personhood on corporation was not a simple matter particularly when one considers that even to give a natural person personhood in the legal sense involves the conferment of 'a new, additive, and distinctive meaning.'<sup>346</sup> Laski offering a realist perspective claims we personalise the corporation 'because we feel in these

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<sup>340</sup> Hallis, *Corporate Personality: A Study In Jurisprudence* (1978) at p. 140.

<sup>341</sup> Teubrier, 'Enterprise Corporatism: New Industrial Policy And The Essence Of The Legal Person' 1988 36 American Journal of Criminal Law 130-155 at p. 134.

<sup>342</sup> M. Woods, 'Lifting The Corporate Veil In Canada' 1957 35 Canadian Bar Review 1176-94 at p. 1177.

<sup>343</sup> Hallis, n. 340 at p. 137.

<sup>344</sup> Anderson, n. 15 at p. 397.

<sup>345</sup> Vincent, n. 335 at p. 708.

<sup>346</sup> Dewey, n. 69 at p. 657.

things the red blood of a living personality. Here is no mere abstractions of an over-exuberant imagination. The need is so apparent as to make plain the reality beneath.’<sup>347</sup> Support for realism is also evident in the comments of Blackstone who claims ‘When they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person they have one will, which is collected from the sense of the majority of the individuals.’<sup>348</sup> Critics of the reality theory argue ‘The doctrine of real, extra juridical personality of a corporation appears to be somewhat insecurely founded seen from a sociological view. It takes verbal imagery for reality. It adopts romantic conceptions, the most typical quality of romanticism being perhaps the tendency to endow inanimate things with life.’<sup>349</sup> It is dissatisfaction with this perceived ‘romanticism’ which has led many to reject realism in favour of the fiction theory.

### **The Fiction Theory**

There is some dispute as to the origins of the fiction theory. There was a Roman law tradition of treating corporate persons as fictions.<sup>350</sup> Hunt contends ‘that brilliant intellectual achievement of the Roman; lawyers, the juristic person, a subject of rights and liabilities as is a natural person, seeped into the law of modern nations by way of canon law.’<sup>351</sup> Roman tradition was that all persons (including human persons) were creations of law. The fiction theory has a two-fold approach. Firstly, that all juristic persons were creations; and secondly, that juristic persons were not composites and as such irreducible. The Romanist fiction theory was arguably the logical outcome of an individualistic view of society.<sup>352</sup> The Romans essentially viewed persons as human beings but at the same time recognised other legal persons namely *Collegia*, *Municipia*, Churches, Charities and the State.<sup>353</sup> In Roman times *persona* was the mask that actors in the Roman theatre wore; it did

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<sup>347</sup> Laski, n. 291 at p. 405.

<sup>348</sup> Pollock, *Essays In The Law: The Fiction Theory Of Corporations* (1922) at p. 161.

<sup>349</sup> Wolff, n. 334 at p. 502.

<sup>350</sup> Sohm, *Institutes Of Roman Law* at p. 20; Buckland, *A Textbook Of Roman Law*, at p. 174; Radin, *The Legislation Of The Greeks And Romans On Corporations*; Radin, *Handbook of Roman Law* at pp. 266 et seq.

<sup>351</sup> Hunt, n. 93 at p. 3.

<sup>352</sup> Hallis, n. 340 op cit. at p. 15.

<sup>353</sup> See A. Borkowski, *Textbook On Roman Law*, (1944) at pp. 76-8.

not refer to the human being or any of the humans qualities.<sup>354</sup> The Roman concept of person was then individualistic in nature and as such all organic associations were excluded.<sup>355</sup> Individuals had legal *caput* (status) and played out the role of *persona*. All societal production was undertaken in *societas* (a purely contractual relationship) Gierke claims,

‘the idea was a stranger to the Roman private law that legal rights and duties could attach to a group of persons connected or associated in such and such a form, as a group of joint and several obligation, as a company.’<sup>356</sup>

Only the State and its sub units under *ius publicum* enjoyed corporate status<sup>357</sup> However, from the time of Caesar and Augustus it was a rule of the *ius publicum* that every association needed State authorisation;<sup>358</sup> juristic persons emanated from the public law with the unitary body (*corpus*) developed from associations. The juristic person was a *Corpus Juris Civilis* and was of essence an artificial person. Gierke challenges the Roman approach and deploying a realist stance claims,

‘The juristic person, however, derives the positive content of its being not from the association law but entirely from individual law. The concept of the person experiences no enrichment of its content by the extension of the sphere of its applicability. First and last it remains gauged to the human unit and takes the sum of its characteristics from the nature of the individual. If it is carried over artificially to impersonal things, it cannot absorb anything which it did not implicitly have.’<sup>359</sup>

The Romanist school of Savigny<sup>360</sup> was a strict adherent of the fiction theory but others contend that the theory was an invention of the modern era.<sup>361</sup> It is probably

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<sup>354</sup> The idea of the individual person is a product of the 17th century Vincent, n. 336 at p. 701.

<sup>355</sup> Gierke, *Das Deutsche Genossenschaftsrecht* in Goebbel, *Cases And Materials On The Development Of Legal Institutions*

<sup>356</sup> Gierke, n. 355 at p. 354.

<sup>357</sup> Gierke, n. 355 at p. 355.

<sup>358</sup> Gierke n. 355 at p. 355.

<sup>359</sup> Gierke, n. 355 at p. 357.

<sup>360</sup> Savigny, *Das System Des Heutigen Romischen Rechts* 1840 BK II, 60 quoted in Hallis, n. 340 at p. 4-5.

<sup>361</sup> Hallis, n. 340 at p. 3.

avoids controversy to talk of the theory as Romanist rather than necessarily Roman.<sup>362</sup> Savigny stated,

‘All law exists for the sake of the moral freedom indwelling in man. Therefore the original idea of a person or of the subject of a right, must coincide with the idea of man, and this original identity of both ideas may be expressed by the following formula: every individual man, and only the individual man, is jurally capable.’<sup>363</sup>

Under the concept of *persona ficta* ‘The juristic person is a fiction and its author is the State.’<sup>364</sup> Its personality is not inherent in it but conceded to it by the State, and therefore the foundations of its existence in the eyes of the law lie, not in the sphere of private law, but in the sphere of public law where the State creates those relations which it considers desirable and forbids those relations which it deems harmful.<sup>365</sup> According to the fiction theory, the corporation is simply a mental construct.<sup>366</sup> Further it has been said ‘the fiction theory is a methodological approach; the real entity doctrine is a proposition in metaphysics designed to give comfort to those who feel that analysis not concerned with real existence is unfruitful. Conflict arises only between those who assume that fictions are unnecessary phantoms, and those who try to transmute the “real entity” of a corporation into a quasi-biological organism.’<sup>367</sup> There is a supposition that under the Fiction theory only human beings can be persons and therefore the subject of rights.<sup>368</sup> However, Savigny has argued ‘that the subject of right does not exist in the individual members thereof but in the ideal whole.’<sup>369</sup>

The fiction theory dominated the United States of America at beginning of 19th century<sup>370</sup> but, Pollock denies that the fiction theory was ever adopted in English

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<sup>362</sup> Hallis, n. 340 at p. 4; According to Gierke, the fiction theory was formulated by Pope Innocent IV in the thirteenth century *Gierke Genossenschaftsrecht*, vol. iii, at p. 279 quoted in Hallis n. 340 at p. 7

<sup>363</sup> Savigny, quoted in Hallis, n. 340 at pp. 4-5.

<sup>364</sup> M. Radin, ‘*The Endless Problem Of Corporate Personality*’ 1932 32 Columbia L. R. 643-667 at p. 645; see Hallis, n. 340 at p. 7.

<sup>365</sup> Hallis, n. 340 at p. 7.

<sup>366</sup> Timberg, n. 336 at p. 542.

<sup>367</sup> Timberg, n. 336 at p. 542.

<sup>368</sup> Wolff, n. 334 at pp. 489-9 also pp. 496-7

<sup>369</sup> Quoted in Hallis, n. 340 at p. 9

<sup>370</sup> S. A. Schane, ‘*The Corporation Is A Person- The Language Of Legal Fiction*’ 1987 61 Tulane L. R. 563-609 at p. 567; the realist theory has since emerged as predominant see Supreme Court

law.<sup>371</sup> Leigh also argues that the English common law did not receive the fiction theory and in fact received no theory of corporate personality at all.<sup>372</sup> The word fiction applied in the context of corporations was used simply to denote that the corporation was an abstraction.

Anthropomorphism by way of the fiction or realist theory of the corporate form has been criticised by many writers not least because 'by fitting organizations into an existing, individualistic legal framework, the metaphor of person offers a simple solution to the problem of corporate legal personality. It thereby diverts attention from the distinctive features of organizations..and from the normative implications of these features.'<sup>373</sup> This linkage between anthropomorphism and the complexities of corporate crime have been explained in the following terms,

'The theories [of corporate criminal liability] are extant in an institutional setting only because the genius of the common law ultimately accorded corporations anthropomorphic treatment and thus recognized them as persons under the law. That in turn inspired the idea that a body of doctrines pertaining to natural persons might be applied with equal force to the juristic persons into which corporations has been transformed.'<sup>374</sup>

Given the controversy engendered by the dichotomised position of the two main theories it is inevitable that there will be those who seek to offer further theories or variants of the existing theories in an attempt to explain the nature of corporate personality. For example, Anderson concedes that Anglo-Saxon jurisprudence has long recognized the existence of two types of persons: 'juristic and natural.'<sup>375</sup> He even perpetuates the idea that juristic persons are artificial and created by the State. However in so doing, he supports Machen who asserts that a corporation cannot be

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pronouncements in *Louisville, Cincinnati & Charleston Railroad Co. v Letson* 43 US (2 How.) 497 (1844) with *Bank of the United States v Deveaux* 9 US (5 Cranch) 61 (1809); see also *Southern Railway Co. v Greens* 216 US 400 (1910) where 14th amendment extended to corporations; cf. Lindley, *Treatise On The Law Of Partnerships*; 'We may equally accept the common valuation suggested by these terms and admit further that 'real' and 'natural' are higher in scale of human values than 'fictitious' and 'artificial' and that therefore a corporate personality is in some way and for some purposes inferior to the individual personality, the personality of the ordinary human being' see Radin, n. 364 at p. 644.

<sup>371</sup> Pollock, n. 348 at p. 179.

<sup>372</sup> Leigh, n. 54 at p. 4.

<sup>373</sup> Dan-Cohen, n. 146 at p. 44.

<sup>374</sup> Brickey, n. 56 at p. 395.

<sup>375</sup> Anderson, n. 15 at p. 394.

at the same time 'created by the State' and fictitious.<sup>376</sup> Arguably, it has been the growth of western individualism that has been problematic in developing coherent concept of legal personality. It has necessitated the creation of the fiction of juristic personality and secondly it has impeded the development of the concept of the multiple personality.<sup>377</sup>

There are commentators who concede that corporations have personality but that that personality is not the same as that dwelling in individuals. According to Vincent 'to refer to a group as a person is not necessarily the same as referring to it as either organic or an individual...each term- organic, individual, and person- must be carefully unpacked and analysed.'<sup>378</sup> Vincent asserts that if the group is an individual person then it must be an organism.<sup>379</sup> Vincent states that 'the concept of the individual should be kept distinct from the idea of individualism. Individualism can be formally defined as a political and moral doctrine which extols the value of the individual human being.'<sup>380</sup> The concept of the individual emphasises a distinct, separate, rational human agent or a separate, distinct being. Additionally, the word individual derives from *individuus* which identifies something indivisible. Accordingly, it is not confined to individual human beings instead it implies 'a comprehensive unity, completeness, wholeness and coherence.'<sup>381</sup>

Pollock drawing on classical interpretation disputes that *persona ficta* equates with artificial person. Artificial in his view is not fictitious.<sup>382</sup> Moreover, Austin distinguishes physical and natural person from fictitious or legal persons.<sup>383</sup> Others see the similarities between corporations and natural persons sufficient for the law

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<sup>376</sup> Machen, 'Corporate Personality' 1911 24 Harv LR 253 at 257.

<sup>377</sup> S. Field and N. Jorg, 'Corporate Liability And Manslaughter: Should We Be Going Dutch?' 1991 Criminal L. R. 156-171 at p. 160.

<sup>378</sup> Vincent, n. 335 at p. 687.

<sup>379</sup> Vincent, n. 335 at p. 690 op. cit.

<sup>380</sup> Vincent, n. 335 at p. 693.

<sup>381</sup> Vincent, n. 335 at p. 695.

<sup>382</sup> *Principles of Contract* (1876), 81 quoted in Pollock, n. 348 at p.154.

<sup>383</sup> Foerschler, 'Corporate Criminal Intent: Toward A Better Understanding Of Corporate Misconduct' 1990 78 California L. R. at p.1295.



to treat them as persons.<sup>384</sup> Gruner draws several distinctions between corporations and humans- they are instrumentalities, they have limited social obligations, and they do not have emotive and reflective capacities.<sup>385</sup> All of these matters can be disputed and indeed have been.

Dubbing a corporation as a juristic person implies a capacity to have rights and duties.<sup>386</sup> Hallis asserts that for a corporation to have personality at law it must have three constituent elements; it must be organised collectively acting as a whole in furtherance on an interest that the State will protect; there must be a legal right and duty bearing unit and a directing idea or aim; and it must have a social value which calls for legal protection because it has a meaning for human life and can be realised.<sup>387</sup> Wells, meanwhile, contends that a corporation is a group of individuals deemed in law to be a single legal entity. It is legally distinct from the individuals who compose it, has legal personality in itself and can accordingly sue and be sued, hold property and transact, and incur liability.<sup>388</sup> Dan Cohen is careful to distinguish individuality and collectivity in saying that 'the relationship between the organization and various individuals may allow the organization to invoke those individuals rights, though the organization is neither bearer nor beneficiary of those rights.'<sup>389</sup> In then context of adherence to the law, the subject of responsibility and duty is of signal importance. Despite the widespread recognition of the corporation as a juristic person 'Business has not even been able to compose a meaningful articulation of its social responsibility.'<sup>390</sup> Indeed there has been a tension between according citizenship to corporations but not the liability that would normally attend such citizens.<sup>391</sup> The challenge must be to induce a greater sense of responsibility whether that is through the concept of personification or not.

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<sup>384</sup> Schane, n. 370 at p. 21. cf. S. Sethi, 'Liability Without Fault: The Corporate Executive As An Unwitting Criminal' 1978 4 Employee Relations L. J. 185 at p. 204.

<sup>385</sup> Gruner, n. 12 at p 89

<sup>386</sup> Laski, n. 291 at p. 405.; Vincent, n. 335 at p. 704.; Stone, n. 35 at p. 34.; cf. Ewall, n. 247

<sup>387</sup> Hallis, n. 340 at pp. 241-2.

<sup>388</sup> Wells, n. 5 at p. 551

<sup>389</sup> Dan-Cohen, n. 146 at p. 60.

<sup>390</sup> Henning in Nader and Green (Eds.), n. 239 at p. 157.

<sup>391</sup> Anderson, n. 15 at p. 379.

## Corporate Morality

The supposition of corporate responsibility and personality undoubtedly has a correlation with the concept of morality. Reference has already been made to the significance of morality in attaching criminal liability. By developing the idea of social expectation and standard we can begin to build a paradigm of corporate morality. In the process the question is posed 'can corporations be treated as 'full-fledged members of the moral community, of equal standing with the traditionally acknowledged residents: human beings?'<sup>392</sup> For French the answer is quite simple- 'Corporations are not only intentional agents, moral persons, they are proper subjects of the criminal law and all of its fury.'<sup>393</sup> Even more simply, it might be argued that criminal and moral responsibility do not require personhood.<sup>394</sup> All that is required is that the corporation is an intentional actor. As Dan-Cohen explains,

'To portray organisations as "intentional systems" possessed of "organizational intelligence" may be a cogent way to express the dual message that organizations make decisions infused with cogent content, which are, at the same time, the product of widely dispersed informational sources and diffused individual interests and attitudes, all mediated by structures, processes and chance in ways that defy translating or tracing the organisational decision into its individual sources.'<sup>395</sup>

Field and Jorg accept that there is a strong argument for recognising reasoning and understanding and control of conduct as the essence of moral personality and the basis of moral responsibility.<sup>396</sup> According to Rafalko, the major problem in contending that corporations are moral persons is the fact that corporations are designed to limit liability.<sup>397</sup> In French's view, the distinction between the fiction and reality theories turns out to be of no real importance in regard to the issue of the moral personhood of the corporation. Admittedly the reality theory encapsulates a view at least superficially more amenable to arguing for discrete

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<sup>392</sup> Stone, n. 35 at p. 32.

<sup>393</sup> French in Fisse and French (Eds.), n. 120 at p. 170; see also Gruner, n. 12 pp 85-8

<sup>394</sup> Walt and Laufer, 'Why Personhood Doesn't Matter: Corporate Criminal Liability And Sanctions' Vol. 18 American Journal of Criminal Law 263-87 at p. 277.; Stone, n. 35 at p. 38

<sup>395</sup> Dan-Cohen, n. 146 at p. 34.

<sup>396</sup> S. Field and N. Jorg, n. 377 at p. 159; see also Hart, *Punishment And Responsibility*, (1968), p. 228.

<sup>397</sup> Rafalko, 'Corporate Punishment: A Proposal' 1989 8 Journal of Business Ethics 917 at p. 918.

corporate moral personhood than does the fiction theory just because it does acknowledge *de facto* personhood.<sup>398</sup>

Historically, Kant and Locke did not argue that groups had moral philosophy<sup>399</sup> and more recently, Vincent has suggested caution in adopting French's idea of corporate moral personality.<sup>400</sup> It betrays understandable and ingenious attempts to further anthropomorphise the corporation. Should we be looking to locate the capacity to display the criminal mind in the corporation as a basis for the attribution of criminal fault? Fisse and Braithwaite clearly believe that corporate responsibility does not require moral personhood or human agency.<sup>401</sup> Despite their view, the attraction of the moral culpability paradigm of criminal law, there is intuitive appeal in attempting to conceive of the corporation as a moral actor.

The patent, and at times painful, desire to anthropomorphise the corporate form to fit it into an inherently individualistic criminal law as a complete strategy, is doomed to falter. If a coherent and intellectually sound basis is to be found for corporate criminal liability one must recognise that corporations and individuals are different. We can in the same breath note the differences and at the same time argue for appropriate parity of treatment. It remains the case that 'that there is no clear cut line, logical or practical, through the different theories which have been advanced and which are still advanced on behalf of the "real" personality of either "natural" or associated persons.'<sup>402</sup> No one theory has dominated and the underlying philosophical basis of corporate criminal liability remains insecure. The absence of a received or accepted wisdom as to the nature of corporate personality does not leave us bereft of a foundation on which to base either the case for corporate criminal liability or its mode of application. The nature of corporate

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<sup>398</sup> French, 'The Corporation As A Moral Person' 1979 16 American Philosophical Q. 207-215 at p. 210.

<sup>399</sup> Kant, *The Metaphysical Elements of Justice* (1965); Locke, 'An Essay in Human Understanding', at p. 211.

<sup>400</sup> A. Vincent, n. 335 at pp. 713-40.

<sup>401</sup> Fisse and Braithwaite, *Corporations, Crime And Accountability* (1993) at p. 133

<sup>402</sup> Dewey, n. 69 at p. 669.

personhood is in the view of some commentators, in any event superfluous to the issue of liability. Fisse for example, argues that

‘Juristic personality merely equates corporate and individual persons for the purposes of practical convenience and is neutral as regards underlying considerations of policy. Viewed more realistically, the equation it produces tends to be biased towards individual persons, who are taken to provide a natural starting point for the design of rules or principles applicable to other species of Juristic person. This bias is patent in the present law of corporate criminal responsibility, the development of which has often been motivated by “little more than a crude personification of the group.”<sup>403</sup>

As far as Walt and Laufer are concerned ‘Determining the ontological status of the corporation is unnecessary. For the assignment of corporate criminal liability does not require that determination. Corporations can be held criminally liable without deciding whether they are persons.’<sup>404</sup> This is patently true. One may almost adopt a positivist stance and simply declare the corporation criminally liable. For simplicity’s sake this may be preferable to perpetuation of the angst occasioned by attempting to justify the attachment of criminal liability to the corporation by anthropomorphic juxtapositioning. Sustaining the realist and fiction dichotomy represents a recipe for factionalised irrelevancy. Just because collectives are human creations, it does not necessarily flow that they must be governed by law derivable from propositions about individuals.

### **1.6 Regulatory Crime And True Crime**

A further major polemic of corporate criminal liability is whether corporations should be liable for true crimes or simply regulatory crimes. The inter-relationship between crime and regulation is undoubtedly problematic.<sup>405</sup> The jurisprudence has much to say on the expansion of regulatory offences in the modern era, the perception of such offences and, in addition the approach taken by authorities in enforcing this branch of criminal law. There naturally requires to be an assessment as to whether regulatory offences can properly address the problem of corporate crime and more cogently, whether liberal consensualism is defeated by the failure

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<sup>403</sup> Fisse, n. 236 at p. 365.

<sup>404</sup> Walt and Laufer, n. 394 at p. 274; Gruner, n. 12 pp 77-80

<sup>405</sup> See Ogus, *Legal Tradition And Economic Theory* (1994) at p. 79

to apply the whole ambit of the criminal law to corporations. Regulatory offences have a considerable attraction for those determined to regulate and control corporations. They represent an attempt by the criminal law to attach directly to the corporation avoiding the complications of *mens rea*. They also represent an attempt to define crimes without reference to harm.<sup>406</sup> For both those reasons, the expansion of regulation is controversial.<sup>407</sup> Often these regulatory offences are viewed as something other than truly criminal.<sup>408</sup> Ball and Friedman contend that ‘the word “crime” has symbolic meaning for the public, and the criminal law is stained so deeply with notions of morality and immorality, public censure and punishment, that labelling an act criminal often has consequences that go far beyond mere administrative effectiveness.’<sup>409</sup> There are several obvious problems with reliance on a regulatory regime. According to Gobert, one of the principal problems associated ‘with regulatory laws in practice, is not simply that they appear to undervalue the harm which has occurred.’<sup>410</sup> Sometimes that harm is the result of fortuitous circumstances, and a prosecution would exaggerate the degree of the company’s fault. The greater problem is that regulatory laws may not exert sufficient deterrent force to prevent violations.’ The clear concomitant of this is that regulatory offences alone may not serve the purpose of prevention of criminal law violations.<sup>411</sup>

According to Leigh, liability for public welfare offences arose because corporations were introduced into fields where regulatory legislation existed.<sup>412</sup> In *Morisette v US*<sup>413</sup> the US supreme court offered a rationale for strict liability ‘public welfare offenses.’ They contended that in spite of the,

‘central thought that wrongdoing must be conscious to be criminal’ the Industrial Revolution had resulted in dangers requiring “increasingly numerous and detailed regulations which heighten the duties of those in

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<sup>406</sup> Gobert, n. 26 at p. 725.

<sup>407</sup> Gobert, n. 26 at p. 725.

<sup>408</sup> Hawke, ‘Crimes Against The Environment’ 1987 16 Anglo-American L. R. 90-96 at p. 90; Kovel, ‘A Case For Civil Penalties: Air Pollution Control’ 1969 46 2 Journal of Urban Law 153-171 at p. 154; Ogus, n 405 at p 80

<sup>409</sup> H. Ball and L. Friedman, n. 188 at p. 216.

<sup>410</sup> Gobert, n. 26 at 726.

<sup>411</sup> Cf. Fortin, Fitzgerald and Elton, *Strict Liability In Law* (1974) at p. 193.

<sup>412</sup> Leigh, n. 54 at p. 15.

<sup>413</sup> 342 US 246 (1952)



control of particular industries..or activities that affect public health, safety or welfare...called 'public welfare offences'...Legislation applicable to such offences as a matter of policy, does not specify intent as a necessary element'. 'many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize..[W]hatever the intent of the violator, the injury is the same and the consequences are injurious or not according to fortuity...The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.'<sup>414</sup>

The distinction between regulatory offences and 'true crime' is often distilled to the distinction between *mala in se* (offences wrong in themselves) and those *mala prohibita* (offences wrong because the law proscribes it so).<sup>415</sup> McVisk explains and reaffirms the notion that true crime should be based on personal moral guilt whereas regulatory offences do not 'involve questions of moral guilt.'<sup>416</sup> Snider also expresses a widely held view that 'the State is reluctant to pass-or enforce-stringent laws against pollution, worker health and safety, or monopolies. Such measures frighten off the much sought- after investment, and engender the equally dreaded loss of confidence.'<sup>417</sup> In my own model regulatory offences are retained and common law crimes activated. I can see no legitimate rationale for only applying regulatory offences to the corporation. Where they have proved beneficial is that the statutory enactments which implement them offer relatively clarity in what constitutes the offence. All parties know what the law is and have an approximate understanding of how it will be applied and how they must respond. There is no such clarity in respect of 'true' common law crimes. An

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<sup>414</sup> Quoted in S. R. Weinfeld, 'Criminal Liability Of Corporate Managers For Deaths Of Their Employees: *People v Warner-Lambert Co.*' 1982 46 Albany L. R. at pp. 666-7; A similar view was expressed in *US v Balint* 258 US 250 (1922) where it was said, 'While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime...there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement ..Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some betterment rather than the punishment of the crimes as in the cases of *mala in se*' see Weinfeld, *supra* at p. 667

<sup>415</sup> Perkins, 'The Civil Offense' 1952 100 (6) University of Pennsylvania L. R. 832-851 at p. 832. *People v Boxer* 24 NY S2d 628 (1940) quoted in S. S. Nemerson, 'Criminal Liability Without Fault: A Philosophical Perspective' 1975 75 Columbia L. R. 1517-77.

<sup>416</sup> McVisk, n. 59 at p. 79.

<sup>417</sup> Snider, n. 10 at p. 214.



integral argument for my proposed approach outlined in chapter 6 is that it will introduce considerable clarity into an otherwise confused situation. The proposal calls for the optimal blend of regulatory offences and common law crimes to be fashioned into a new framework.

### 1.7 Theories Of Corporate Offending

Theorists often pose the question ‘why does crime exist?’ If we can attain the answer then the simplistic supposition is that we can solve the problem. The capacity and potential of crime by corporations seems self evident but this does not explain why corporations commit crime. There are those who believe that such criminality arises from criminogenic culture within the organisation.<sup>418</sup> Why and how that criminogenic culture should arise is also the subject of much comment. One view is that,

‘The problem at the core of such conduct is not simply that corporations have no conscience, but that they have been endowed by law with rights beyond those allowed to individuals. Corporations too often act without compassion and, no matter what damage they cause, without remorse.’<sup>419</sup>

Mintz similarly believes that the corporate structure with its orientation towards profit and away from liability invites corporate criminality and that ‘all the deterrents and restraints that normally govern our lives- religion, conscience, criminal codes, economic competition, press exposure, social ostracism have been overwhelmed.’<sup>420</sup> Gross posits that all organisations are inherently criminal<sup>421</sup> but perhaps it is fairer to say that ‘Crime ..is an ever-present possibility, perhaps endemic to the structure itself.’<sup>422</sup> Criminogenic culture may be developed from external sources particularly other corporations. Vaughan notes ‘co-operation between organizations is known to be encouraged by corresponding ideologies, as well as by domain consensus- a set of stable expectations about what an organisation will or will not do. Furthermore evidence suggests that emergent group tend to develop around previous interaction patterns, which provide the basis

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<sup>418</sup> Colvin, n 339 at p. 4.

<sup>419</sup> Mintz in Hills, n. 32 at p. 30.

<sup>420</sup> Mintz in Hills, n. 32 at p. 38.

<sup>421</sup> Wilson and Braithwaite, n. 139 at p. 199.

<sup>422</sup> Gross, in Geis and Stotland, n. 129 at p. 74.

for further structural differentiation and organizational development.<sup>423</sup> It is not, however, simply the collective criminogenic culture and how it impacts on the individual which is significant in this context but also the capacity the collective form offers the errant individual. There is a view that organisations provide a heightened sense of legitimacy to individuals which allows them to perpetrate damaging criminal acts.<sup>424</sup>

Cressey argues that corporate criminality cannot be explained by reference to the reasons why ordinary citizens commit crimes.<sup>425</sup> According to Cressey, this blurring of corporate crimes committed by corporations and corporate crimes committed by individuals is confusing and does not lend itself to one causal theory.<sup>426</sup> Sutherland viewed corporate crime as no different from other crime in that it is learned behaviour.<sup>427</sup> Sutherland's theory of differential association presupposed that

'criminal behaviour is learned in association with those who define such criminal behaviour favorably and in isolation from those who define it unfavourably, and that a person in an appropriate situation engages in such criminal behaviour if, and only if, the weight of the favorable definitions exceeds the weight of the unfavourable definitions.'<sup>428</sup>

Linked to the notion of differential association is Sutherland's thesis of social disorganisation which he splits into two types -anomie and the organisation within society of groups. In respect of variation in the crimes of corporations, Sutherland suggest four types of factors- the age of the corporation, the size of the corporation, the position of the corporation in the economic structure, and the personal traits of the executives of corporations.<sup>429</sup> Coleman offers further analysis by saying that,

'[T]hose who are employed in these businesses are often isolated from businesses where illegal behaviour is not common; therefor their values and attitudes become permeated with the idea that criminal behaviour is normal. Through their associations with others in the same business who

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<sup>423</sup> Vaughan, n. 60 at p. 21.

<sup>424</sup> Wheeler and Rothman, n. 267 at p. 1424.

<sup>425</sup> Cressey, 'The Poverty Of Theory In Corporate Crime Research' 1988 1 *Advances in Theoretical Criminology* 31 at p. 37.

<sup>426</sup> Cressey, n. 425 at p. 40.

<sup>427</sup> Sutherland, n. 237

<sup>428</sup> Sutherland, n. 237 at p. 240.

<sup>429</sup> Sutherland, n. 237 at p. 259.

justify their offenses as being normal, these people learn to accept these practices.<sup>430</sup>

Whilst such an approach offers almost a pastiche of the unscrupulous businessman it remains nonetheless valid in several respects. Some sociologists have accentuated the individualism of those involved and pointed to personality disorders and the “exploitative nature of society” generally.<sup>431</sup>

Clinard and Yeager argue that illegal corporate behaviour cannot be fully explored within the framework of theories of deviance and crime that are applicable to individuals.<sup>432</sup> They argue for analysis on the basis of the complexity of the organisation. Their view is that ‘The immensity, the diffusion of responsibility, and the hierarchical structure of the large corporations foster conditions conducive to organizational deviance.’<sup>433</sup> Clinard and Yeager also note that,

‘firms may be possessed of multiple goals rather than simply high profits, and these other goals may also be important in the genesis of corporate crime...Nonetheless, the desire to increase or maintain current profits is the critical factor in a wide range of corporate deviance.’<sup>434</sup>

Kramer identifies three factors which have significant relationship with corporate crime -organisational goals<sup>435</sup> (these are distilled from individuals and the environment and internal pressures), organisational structure<sup>436</sup> (may impact on organisational goals),<sup>437</sup> organizational environment<sup>438</sup> (economic conditions state of the economy, market conditions). As an alternative, Kreisberg argues for legal policy to be determined on the basis of an understanding of the decision making process underlying corporate action<sup>439</sup> Kreisberg seeks to establish that criminal

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<sup>430</sup> Coleman, n. 14 at p. 918.

<sup>431</sup> See Coleman, n. 14 at p. 918

<sup>432</sup> Clinard and Yeager, n. 7 at p. 43.; ‘The key to understanding this fundamental human enigma lies not in the pathology of evil individuals but in the culture and structure of large scale bureaucratic organizations within a particular political economy ( Hills, n. 32 at p. 190)

<sup>433</sup> Clinard and Yeager, n. 7 at p. 43.

<sup>434</sup> Clinard and Yeager, n. 7 at p. 47.

<sup>435</sup> Kramer in Wickman and Dailey (Eds.), n. 50 at pp. 81-84.

<sup>436</sup> Kramer in Wickman and Dailey (Eds.), n. 50 pp. 84-87.

<sup>437</sup> Kramer in Wickman and Dailey (Eds.), n. 50 p. 85.

<sup>438</sup> Kramer in Wickman and Dailey (Eds.), n. 50 pp. 87-90.

<sup>439</sup> Kreisberg, ‘*Decision Making Models And The Control Of Corporate Crime*’ 1976 85 Yale Law Journal 1091 at p. 1092.

responsibility emerges from decision making models and that, 'responsibility lies with whichever corporate decision-makers were capable of preventing the corporate offense that occurred.'<sup>440</sup> Kreisberg's three models all imply the identity of the decision-maker varies according to the character of the corporate decision-making.<sup>441</sup> Staw and Sz wajkowski attempt in a very basic study to assess the correlation between the commission of illegal acts and the 'scarcity-munificence' environment in which the organisation is located. Implicit in their research is the notion that corporations resort to crime when confronted with austere economic circumstances.<sup>442</sup> Utilising the Fortune 500 article in *Time Magazine* on corporate violations the writers concluded that those companies were performing less well at the time of commission of the violations. Such extrapolation must be viewed with some caution. As Staw and Sz wajkowski themselves note,

'The industries in which the cited firms operated were low performing and may have been beset with industry wide problems such as poor demand for a given class of products, shortages of raw materials, or widespread strikes. Although it is difficult to ascertain the exact problem facing each of these industries, it is clear that the industrial environments of the companies cited for illegal acts were less munificent than those of the other companies in the Fortune 500.'<sup>443</sup>

The size of the corporation is something that jurists have looked to as a determinant factor in the commission of crime. Unfortunately, no real consensus emerges from the literature. Kreisberg suggested in his study that illegal behaviour was found in newer smaller less profitable businesses.<sup>444</sup> Whereas Croall forms the view that corporate crime is committed by large and small companies.<sup>445</sup> Organizational theory and decision-making processes within organisations remain of singular importance in the study of corporate crime. There must be congruence between the law and the way organisations decide. Only in that way can we hope

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<sup>440</sup> Kreisberg, n. 439 at p. 1099.

<sup>441</sup> Kreisberg, n. 439 at p. 1099.

<sup>442</sup> B. M. Staw and Sz wajkowski, 'The Scarcity-Munificence Component Of Organizational Environments And The Commission Of Illegal Acts' 1975 20 Administrative Science Q. 345-353.

<sup>443</sup> Staw and Sz wajkowski, n. 442 at p. 351.

<sup>444</sup> Kreisberg (1956) quoted in Calavita and Pontell, n. 215 at p. 526.

<sup>445</sup> Croall, n. 234 at p. 23.

to activate internal policing mechanisms and at the same time develop laws which touch upon the nerve centre of the organisation.<sup>446</sup>

## 1.8 Conclusion

It is difficult to summarise the contents of this chapter. The diffuse nature of the issues canvassed has been alluded to in the abstract. Several key issues shape the landscape upon which we wish to establish corporate criminal liability. We have a starting point of several key legacies. The criminal law developed before the advent of the corporate form. The early principles were not developed with the corporation in mind. Progressively, there has been recognition that corporations possess the capacity to damage society and that the criminal law might operate as a tool, in the same way that it applies to individuals, to regulate harmful conduct. The history of corporate criminal liability is a tortuous one beset by polarised debates as to the true nature of corporations, why offending occurs, and the criminal law itself. All of these have fashioned views on the subject of corporate criminal liability. As Winn explains,

‘Even today the gradual process of emancipation of legal thinking about the nature of corporations has not entirely thrown off all the shackles of Blackstonian anthropomorphism. Intellectual difficulty is still felt in giving corporate significance to certain kinds of acts, and a tendency is still perceptible to regard certain actions as in the nature of things incompatible with the intangible non physical nature of corporations...The whole history of the legal treatment of corporations illustrates the steady trend away from primitive anthropomorphism to a broad conception of a very wide field of potential corporate responsibility. Public policy demands that corporations be held to a higher degree of responsibility than individuals, in proportion as they are more powerful and equipped materially to work much greater harm.’<sup>447</sup>

Despite the substance of the literature and the debates it has engendered, we are no nearer reaching a consensus. Some of the arguments are simply incapable of being compromised. Increasingly, greater numbers of jurists and jurisdictions are being convinced of the merits of corporate criminal liability. The arguments are now being realigned to assess what form that liability will take and to what extent it will

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<sup>446</sup> See Fisse and Braithwaite, n. 401 at p. 131

<sup>447</sup> Winn, n. 328 at pp. 414-5.



be recognised. Subscription to the view that corporate liability should be promoted and that there should be an effective system of corporate criminal liability operating in Scotland should not ignore that, 'The development of appropriate defined legal rules does not ensure effective legal regulation of a particular area of social life.'<sup>448</sup> Davids outlines four principle strategies to control white collar crime<sup>449</sup> - the development of better private house-keeping by corporations; secondly individualistic punishment and deterrence, thirdly a structural and preventive approach, and finally a deterrent and punitive approach to corporate deviants. In the course of this thesis I hope to lend support to this four-cornered strategy in a Scottish context. The case for corporate liability is beyond doubt. It is both efficacious and necessary. The impact of corporate criminality necessitates intervention. In certain circumstances the liability that ensues should be corporate in nature rather than transplanted individualism. Society has all too often become victims of its own creation. What started as a mechanism for societal good has become a metaphysical entity which all too often places self-interest and the interests of the few above the general interest.<sup>450</sup> In corporate criminal liability we possess a mechanism which will permit that self interest but within certain confines; self interest which also promotes collective interest. In a liberal democratic society that is as much as we can hope for. Corporate criminal liability as a credo cannot hope to prosper if it remains 'constrained by principles developed to deal with individual crime.'<sup>451</sup> One method might be to create a specific legislative framework.<sup>452</sup> In developing such a system there are obvious and real benefits in looking to the Anglo-American jurisprudence for guidance and solutions. They have grappled with the conundrums of corporate crime more than any others. It is their jurisprudence which has sought solutions to the apparently insoluble; and it is their jurists who have exhibited a willingness to develop imaginative possibilities inherent in attaching criminal liability to the corporation. It is stark testimony to

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<sup>448</sup> Field and Jorg, n. 327 at p. 171.

<sup>449</sup> Davids, 'Penology And Corporate Crime' 1967 58 Journal of Criminal Law, Criminology and Police Science 524-31 at pp. 529-30.

<sup>450</sup> *Time Magazine* (Dec. 17 1984) p. 6.

<sup>451</sup> Braithwaite, n. 5 at p. 309.

<sup>452</sup> Kelly, 'Corporate Manslaughter And UK Common Law: Lessons To Be Learned From Our Experience' 1991 OGLTR 177-187 at p. 186.



obsolescence of our own jurisprudence that we in Scotland start from a desolate 'tapestry' devoid of any substantial utterances on the subject of corporate crime. In reviewing that state of affairs it is difficult to conclude whether one should bemoan the absence of indigenous jurisprudence or, simply welcome the opportunity to develop a system anew, bereft of any significant past 'baggage.' On balance the optimism of the latter commends itself; maintenance of the *status quo* is no longer tenable in a society having to face the stark realities of corporate crime.

## CHAPTER 2

### ATTRIBUTION OF CORPORATE CRIMINAL LIABILITY

#### 2.0 Introduction

One of the enduring controversies of corporate criminal liability surrounds the basis of ascription of liability itself. The importance of finding the most appropriate method of ascribing liability cannot be over-stated. Not only does it represent the intellectual foundation of corporate criminal liability, it also may, in some part, determine whether or not any system of corporate criminal liability engenders support from the wider community. Only in circumstances where the basis of liability is seen to be fair and justifiable can broad support be expected. Consensus on the issue of the appropriate basis of liability has so far eluded even the Anglo-American jurists. The absence of global consensus is not in itself concerning. There is, it would seem, often an absence of consensus within particular jurisdictions as to how liability should be attached to the corporations.

The situation is such that it is relatively easy to support the proposition that,

‘One of the most pressing tasks facing contemporary ethical and legal thought is the development of intellectually sound and effective approaches for assessing the moral and legal implication of individuals acting within the context of collectivities such as corporations and of the actions and policies of these collective entities themselves.’<sup>1</sup>

The process of refinement of the basis of ascription of criminal liability is clearly a dialectical process. That there has been much geographic and temporal cross-fertilisation of ideas and approaches is beyond doubt. Indeed if any sort of broad consensus is ever to be achieved that process of mutuality must continue.

Gobert offers four models of corporate criminal liability.<sup>2</sup> These four ‘models’, or methods of ascribing liability, can be variously described as vicarious liability, the ‘identification’ model, the ‘aggregation’ model and, the corporate fault model.<sup>3</sup>

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<sup>1</sup> J. Surber, *Individual And Corporate Responsibility: Two Alternative Approaches* 1983 2 Business and Professional Ethics Journal 67-88 at p. 67.

<sup>2</sup> Gobert, *Corporate Criminality: Four Models Of Fault* 1994 14 Legal Studies 393-410 at p. 395 et seq.

<sup>3</sup> *Developments In The Law. Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions* 1979 Harvard Law Review 1229-1375, at pp. 1242-3.

Each has attained a measure of support at various times and in different jurisdictions. By way of amplification, Dan-Cohen offers (without necessarily supporting them) two paradigms in the legal treatment of corporations- the holistic view and the atomistic. Imputing intent from individuals to the corporation is in his view atomistic in conception.<sup>4</sup> The modern academic trend has been away from such atomistic conceptions to a holistic approach. The atomistic conceptions nonetheless have strong roots in the common law jurisdictions and in different guises represent the approach that they all take to the ascription of liability. The imputation of liability from corporate agents at what ever level within the organisation betrays the continued philosophical commitment to the inherent individualism of the criminal law. Only when one is prepared to concede that the corporation as a collectivity can be liable for its own criminal wrongs, does one veer towards an altogether more holistic basis for the ascription of criminal liability. The sustained support for those approaches which attach liability to the corporation through corporate actors ensures that in any discussion of the subject of corporate crime, that they are given respectful consideration. Gobert's four models and Dan Cohen's paradigms offer a useful template in which to discuss the subject. In Scotland, there has been a perceptible reluctance to adduce on what basis criminal liability attaches to the corporation for common law crimes (see chapter 6). Here again we may learn much in the gyrations of the Anglo-American systems rather than our own sparse indigenous jurisprudence.

## 2.1 Vicarious Liability

The first obvious attempts at ascribing criminal liability to corporations were done on the back of the established civil law doctrine of vicarious liability. Criminal vicarious liability has its origins in the civil law agency concept.<sup>5</sup> It is often

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<sup>4</sup> See Foerschler, 'Corporate Criminal Intent: Toward A Better Understanding Of Corporate Misconduct' 1990 78 California L. R. 1287 at p. 1298.

<sup>5</sup> See Kreisberg, 'Decision-Making Models And The Control Of Corporate Crime' 1976 85 Yale L. J. 1091 at p. 1095; see O. W. Holmes, 'Agency' 1891 6 8 Harvard L. R. 345-64; Wolfenden Report, Chap II pp. 9-10 quoted in J. H. E. Williams, 'The Proper Scope And Function Of Criminal Law' 1958 74 Law Quarterly R. 76-81 at p. 76; Sayre, 'Criminal Responsibility For The Acts Of Another' 1930 43 Harvard L. R. 689-723 at pp. 689-694; Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' 1996 109 Harvard L. R. 1477-1532 at pp. 1482; Lederman, 'Criminal Law, Perpetrator And Corporation: Rethinking A Complex Triangle' 1985 76 Journal of Criminal Law and Criminology 285-340 at p. 288; T. Baty, 'Criminal Vicarious Liability' in *Vicarious*

rationalised on the basis of the proximity of relationship between the corporation and its individual human actor. Gobert, for example, argues that,

‘[A]s an employer is responsible for selecting, training and supervising the employee, not to mention placing the employee in a position where the offence can be committed, should not the employer also be responsible for the employee’s crime? the case for liability becomes even more compelling when the employee has acted to benefit the company and the company has retained the profits generated by the wrongdoing.’<sup>6</sup>

Similarly, it has been claimed, ‘Criminal responsibility on the part of the principal, for the act of his servant in the course of his employment, implies some degree of moral guilt or delinquency, manifested either by direct participation in or assent to the act, or by want of proper care and oversight, or other negligence in reference to the business which he has thus intrusted to another.’<sup>7</sup> Fisse points out that there must be limitations of such an approach in that the aims of civil and criminal law do not coincide.<sup>8</sup> Mueller in recognising the link with tort notes nonetheless that ‘many courts simply failed to appreciate any material difference between the two bodies of law.’<sup>9</sup> Ashworth adopting a stance founded on public policy explains that vicarious liability as a foundation of criminal liability has its basis on ‘pragmatism’ and the requirements of society.<sup>10</sup> Laski (in slightly more colourful language) argues that,

‘The meaning of the sword of Damocles forged for [corporations] penalization is rightly to be found, not in the particular relation they bear to their charge, but in the general relation to society into which their occupation brings them.’<sup>11</sup>

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*Liability*, (1916); Winn, ‘*The Criminal Responsibility Of Organisations*’ 1929 3 Cambridge L. J. 398-415 at p. 398.

<sup>6</sup> Gobert, n. 2 at p. 396.

<sup>7</sup> Colt J in *Commonwealth v. Morgan* 107 Mass 199,203-4 1871 quoted in Sayre, n. 5 at p. 711.

<sup>8</sup> Fisse, ‘*The Social Policy Of Corporate Criminal Responsibility*’ 1978 6 Adelaide L. R. 361-412 at p. 366.

<sup>9</sup> Mueller, ‘*Mens Rea And The Corporation*’ 1957 19 University of Pittsburgh L. R. 21-48 at p. 39.

<sup>10</sup> A. Ashworth, *Principles Of Criminal Law*, (2nd ed., 1995) at p. 113. see also H. J. Laski, ‘*The Basis Of Vicarious Liability*’ 1916 26 Yale L. R. 105-35 at p. 113. Welsh, ‘*The Criminal Liability Of Corporations*’ 1946 62 Law Quarterly Review 345-65 at p. 347; see also J. L. J. Edwards, *Mens Rea In Statutory Offences*, (1955), at p. 217

<sup>11</sup> Laski, n. 10 at p. 113; see also Welsh, n. 10 at p. 347; see also G. Stessons, ‘*Corporate Criminal Liability: A Comparative Perspective*’ 1994 International and Comparative Law Quarterly 493-520 at p. 519.

Sayre traces the development of *respondeat superior* and maintains that the doctrine as it is applied is relatively modern in origin. The historic origins of *respondeat superior* dictated that someone would be liable for the acts of another where they commanded it or procured it.<sup>12</sup> The problem was that procuring or commanding of a crime led to guilt through doctrines of aiding and abetting in any case.<sup>13</sup> The enshrinement of aiding and abetting as a criminal concept blocked the development of criminal vicarious liability. Nonetheless, Sayre identified three exceptions to the rule that there can be no criminal vicarious liability- nuisance, libel and where statute expressly provides for it.<sup>14</sup> The third departure from the basic principle remains of singular importance in the area of corporate crime in the modern era. Where statute expressly provides for vicarious criminal liability the common law rule will be displaced. Sayre draws a sharp distinction between what he calls 'true' crime and petty misdemeanours.<sup>15</sup> He does so on the basis that *respondeat superior* offends our deep seated notion that guilt is personal and individual where the crime involves moral delinquency. This argument that all regulatory crime does not involve moral obliquacy remains overly simplistic and as such an unreliable basis on which to exclude vicarious liability from 'true crime.' Sayre, nevertheless captures the essence of our disinclination to embrace vicarious liability. Ultimately, the ordinary citizen's perception of crime remains of signal importance and the offence that the proposition that criminal liability may attach through the actions of another gives ensures that it can only be justified in certain circumstances. It cannot provide a universal basis for the ascription of criminal liability.

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<sup>12</sup> Sayre, n. 5 at pp. 690-1.

<sup>13</sup> Sayre, n. 5 at p. 649; see *NCB v Gamble* [1959] 1 QB 11 cf. *R v Daily Mirror Newspapers Ltd.* [1922] KBD 530

<sup>14</sup> Sayre, n. 5; see also *Welsh*, n. 10 at pp. 348 et seq.; see also *R v St Lawrence Corp.* (1969) 2 OR 305 at p. 320 'While in cases other than criminal libel, criminal contempt of court, public nuisance and statutory offences of strict liability criminal liability is not attached to a corporation for the criminal acts of its servants or agents upon the doctrine of *respondeat superior*, nevertheless, of the agent falls within a category which entitles the court to hold that he is the vital organ of the body corporate and virtually its directing mind and will in the sphere of duty and responsibility assigned to him so that his action and intent are the very action and intent of the company itself, then his conduct is sufficient to render the company indictable by reason thereof. It should be added that both on principle and authority this proposition is subject to the proviso that in performing the acts in question the agent was acting within the scope of his authority either express or implied.' see Sayre, n. 5 at pp. 710-12; see *Triplex Glass Co. Ltd. v Lancegay Safety Glass (1934) Ltd.* 1939 2 KB 394; *Finburgh v Moss Empire Ltd.* 1908 SC 928

In respect of corporations, vicarious liability may be justified because it is directed to ensuring more internal policing.<sup>16</sup> The deterrence inherent in vicarious liability revolves round greater shareholder and corporate officer attention to the selection of officers and subordinates.<sup>17</sup> As a model of liability, it certainly has utilitarian value in obviating problems of ascribing liability where the wrong is committed by the lower level official.<sup>18</sup> Because liability transmits through the wrongdoer to the corporation, individuals need not be prosecuted.<sup>19</sup> That may not be a good precept on which to operate in all circumstances; there will be many instances where the individual should rightly be prosecuted in addition to the corporation. Vicarious liability may also be justified on the basis of criminal law's chief aim of prevention and on the legitimate criminal goal of compensation.<sup>20</sup>

Notwithstanding its positive attributes, vicarious liability has been the subject of criticism based primarily on the injustice of vicarious liability and its inefficiency in respect of corporate criminal liability.<sup>21</sup> There are many who find vicarious liability as a basis of ascription of liability anathema to the proper notion of criminal liability. Sayre, for example, has stated that, 'Vicarious liability is a conception repugnant to every instinct of the criminal jurist.'<sup>22</sup> Edwards similarly takes the view that,

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<sup>15</sup> Sayre, n. 5 at p. 717.

<sup>16</sup> L. H. Leigh, *The Criminal Liability Of Corporations In English Law*, (1969), at p. 75; see also *James and Sons Ltd. v Smee* [1954] 1 QBD 273 per Lord Parker at p. 279

<sup>17</sup> Cf. Welsh n. 10 at p. 286 believes, 'While an additional deterrent effect might be gained by applying *respondeat superior* to all crimes of corporate agents, no characteristic peculiar to corporations demands exceptional measures. Large corporate assets combined with the possible financial irresponsibility of the agent- in cases where a fine is imposed- are not legitimate reason for straining established criminal concepts.'

<sup>18</sup> A. J. Duggan, 'The Criminal Liability Of Corporations For Contraventions Of Part V Of The Trade Practices Act' 1977 5 Australian Business L. R. 221-247 at p. 222.

<sup>19</sup> J. S. Parker, 'Criminal Sentencing Policy For Organisations' 1989 26 American Criminal L. R. at p. 523.

<sup>20</sup> See Coffee, 'Corporate Criminal Responsibility' in Kadish, *Encyclopaedia Of Crime And Justice Vol. 1*, (1984), at p. 257.

<sup>21</sup> Coffee, n. 20 at p. 257.

<sup>22</sup> Sayre, n. 5 at p. 717; Khanna, n. 5 at p. 1485 Holt himself rejected criminal vicarious liability in *Hern v Nichols* 1 Salk 289 (1708). The question of criminal *respondeat superior* was posed and clearly repudiated in *Rex v Huggins* 2 Strange 882 (1730); see also see *R v Holbrook* 4 QBD 42 (1878); *Chisolm v Doulton* 22 QBD 736 (1889); *Hardcastle v Bielby* [1892] 1 QB 709; see *Gair v Brewster* 1910 SLT 36 per Lord Justice General at p. 38



'So long as modern legislation continues to intrude itself into every sphere of trading, business, health and social welfare activities, laying down elaborate codes of conduct to be observed by responsible officials so, too, the doctrine of vicarious liability will continue to be an evil necessity. But each gesture on the part of the judiciary and of the legislature which refuses to extend the obnoxious principle is to be applauded.'<sup>23</sup>

Another major objection to *respondeat superior* as the basis for corporate criminal liability is adduced in a Harvard Law Review note which points out that,

'Once *respondeat superior* is applied to crimes, however, the stigma of conviction becomes weakened as the public begins to recognize that criminal liability may not signify lack of good faith on the part of corporate management. If such a trend were extensive, the economic loss from corporate punishment might be passed on to the consumer as in the case of torts, and the whole purpose of recognising corporate responsibility for crimes would thus be vitiated.'<sup>24</sup>

Gobert offers some understanding of the difficulty in using vicarious liability as a model for criminal liability.<sup>25</sup> The practical difficulty in supervising what may be thousands of employees represents an enormous burden on an employer. In Gobert's view supervision can be supplanted by policy formulation designed to ensure that employees and the company remain within the confines of the law. Vicariously liability as a fault attribution model retains the problem that a company may become criminally liable in circumstances where the majority of its employees have not broken the law and the company has taken reasonable (or indeed exemplary) steps to prevent criminal conduct. According to Leigh, *respondeat superior* cannot be considered to be a satisfactory general basis of liability.<sup>26</sup> It is inherently unfair in that liability might ensue even in circumstances where the company have expressly forbidden the act. One of the other key deficiencies of vicarious liability as the basis on which to ascribe corporate criminal liability is the fact that it only impacts on the *actus reus* of the crime. As Gobert explains, 'courts that are prepared to attribute an employee's act to the company may balk at attributing the employee's mental state as well.'<sup>27</sup> Writing in 1978, Fisse argued

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<sup>23</sup> Edwards, n. 10 at p. 243.

<sup>24</sup> Note: 'Criminal Liability Of Corporations For Acts Of Their Agents' 1946 60 Harvard L. R. 83-289 at p. 286

<sup>25</sup> Gobert, n. 2 at p. 397.

<sup>26</sup> Leigh, n. 16 at p. 118 op. cit.

<sup>27</sup> Gobert, n. 2 at p. 399.

that '[A]lthough states of mind are now attributable personally to corporations under the identification principle, the results of applying that principle are so dysfunctional that vicarious liability retains much vitality.'<sup>28</sup> This may in part explain the continued recourse to vicarious liability as a model of corporate liability in certain spheres. For all its truth, it represents a somewhat impoverished rationale for the retention of vicarious liability as a universal basis of corporate criminal liability.

How far is the imputation of knowledge to the corporation to be taken? Should the corporation be at fault where the corporate agent's wrongdoing is directed against the company. In *Belmont Finance Corp. Ltd v Williams Furniture Ltd*<sup>29</sup> Buckley J argued that 'if an agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud, that knowledge is not to be imputed to the principal.'<sup>30</sup> Von Nessen suggests that it is the very nature of the dichotomy of the corporate form and those who control it being essentially at one which throws up nonsensical problems in corporate crime.<sup>31</sup> Equating the individual mind with that of the company might lead to a situation where theft from the company by those self same minds goes unpunished because the courts consider that the company through its officers has consented to the transfer. In America, vicarious liability evidently does not preclude corporate employers from being liable for employees exceeding their authority. In *US V Beusch*<sup>32</sup> the court argued that,

'[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but ..the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation. Merely stating or publishing such instructions and policies without diligently enforcing them is not enough to place the acts of the employee who violates them outside the scope of employment.'<sup>33</sup>

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<sup>28</sup> Fisse n. 8 at p. 366.

<sup>29</sup> [1979] Ch. 250

<sup>30</sup> See P. Von Nessen, 'My Body, Myself: Problems Of Identity In Corporate Crime' 1985 3 Company and Securities L. J. 235-45 at p. 237; see also *R v Nordig* [1975] AC 123; *Moore v Bresler Ltd.* [1944] 2 KBD 515 cf. Attorney General's Reference (No 2 of 1982) [1984] 2 All ER 216; Calvert 'The Case Of The Schizophrenic MD' 1964 27 MLR 220

<sup>31</sup> Von Nesson, n. 30 at p. 245.

<sup>32</sup> 596 F 2d 871 at 878 (9th Cir 1979)

<sup>33</sup> Similarly, in *US V Hilton Hotel Corp.* 467 F 2d 1000 ((9th Cir 1972) it was said, 'A corporation is responsible for the acts and statements of its agents, done or made within the scope of their

Vicarious criminal liability continues to be found in many of the statutory criminal offences. In the United Kingdom the position in respect of these regulatory offences is well settled; vicarious liability applies in respect of strict liability offences and now also to offences of negligence or hybrid offences (those providing due diligence or reasonable knowledge test).<sup>34</sup> Despite several early cases where vicarious liability was used as the underpinning model of criminal fault, other than in strict liability statutory offences there appears to be little current enthusiasm for pursuing this as a basis of corporate criminal liability. An illustration of such reluctance is to be found in the relatively recent case of *Seaboard Marine Offshore Ltd v Secretary of State for Transport*.<sup>35</sup> Following the breakdown of the ship's engine three times in twenty-four hours, the defendant company were charged under section 31 of the Merchant Shipping Act 1988 of failing to take all reasonable steps to secure that the ship was being operated in a safe manner. The Chief Engineer had failed to board the ship until three hours before it was set to sail. It was conceded in evidence that the requisite time for an engineer to acquaint himself with the operations of the ship would have been three days. In concluding that the duty imposed by the statute was a personal one to the owner charterer or manager, the House of Lords took the view that if these individuals or any other who were entrusted with the exercise of power had acted reasonably, then that would satisfy the test of the statute. A strict construction of the section ensured that liability would not be attributed to the company through the acts or omissions of employees. Lord Keith's judgment in *Seaboard Marine Offshore Ltd* equated the duty in section 31(4) with the setting of procedures and parameters under which operatives would work. He argued that a duty to secure that the ship is operated in a safe manner, 'conveys the idea of laying down a safe manner of operating the ship by those involved in the actual operation of it and taking appropriate measures to bring it about that such safe manner of

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employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's stated policies.'

<sup>34</sup> Wells, 'Cry In The Dark: Corporate Manslaughter And Cultural Meaning' in Loveland (1995) at p. 111; *Wright v Ford Motor Co.* [1967] 1 QB 230; *Gammon (HK) Ltd. v A-G of Hong Kong* [1984] 2 All ER 503

<sup>35</sup> [1994] 2 All ER 99

operation is adhered to.<sup>36</sup> In the opinion of Lord Keith, the owner, charterer or manager is criminally liable if he fails in his duty personally and not criminally liable through the operation of the doctrine of vicarious liability of his employees.

Despite this lack of enthusiasm, there is evidence that the courts have not entirely ruled out the application of the concept of vicarious liability in corporate criminal liability. In *National Rivers Authority v Alfred McAlpine Homes East Ltd*,<sup>37</sup> the court held that the company was vicariously liable for the actions of two specific employees. The company's site agent and site manager had admitted responsibility for the pollution caused by the ingress of wet cement into controlled waters. A river downstream from a building site was inspected by the National Rivers Authority and found to be cloudy. It transpired that cement had been washed into the stream during construction of a water feature. There was a concession that the employees could not be the 'alter ego' of the company as they were not sufficiently senior. Morland J in taking a fairly purposive view of the statute indicated that he could not see why Parliament had not intended to impose liability on the company to control pollution as they were best placed to ensure that it did not take place. He also thought it sufficient that those immediately responsible on site were employees. Moreover, Wells suggests that vicarious liability was applied in the *mens rea* case of *Re Supply of Ready Mixed Concrete (No2)*.<sup>38</sup> However, that case must be contrasted with the approach in *Seaboard Marine Offshore Ltd v Secretary of State for Transport*<sup>39</sup> where the House of Lords made it clear that a company could not be vicariously liable for breach of duty for the acts of its servants or agents. How does one reconcile these decisions? It appears that it may turn on the interpretation of the particular statute. Writers look to the more recent case of *Median Global Funds Management Asia Ltd v Securities Commission*<sup>40</sup> where the Privy Council again rejected vicarious liability holding that a person had to be found within the company whose acts and knowledge can be attributed to the

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<sup>36</sup> [1994] 2 All ER 99 at p. 104.

<sup>37</sup> *The Times*, 3 February 1994.

<sup>38</sup> [1995] 1 All ER 135

<sup>39</sup> [1994] All ER 99

<sup>40</sup> [1995] 3 All ER 918

company. However, in illustration of how confusing the situation is, Lord Hoffman was of the opinion that directing mind theory was only appropriate in certain cases and that in other situations,

‘the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation given that it was intended to apply to a company, how was it intended to apply ? Whose act (or knowledge or state of mind) was for this purpose intended to count as the act etc. of the company ?’...‘their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company.’<sup>41</sup>

Vicarious liability remains a vital part of the corporate criminal liability equation whether it be clearly required in specific statutory offences or in the brief hints offered by some recent judicial pronouncements.<sup>42</sup> The expansion of regulatory offences has in this context significant importance. The trend in both United Kingdom and America is illustrative of two themes- the move from the protection of individual interests to societal interests and, secondly, the growing utilisation of criminal law to enforce not just true crimes but regulatory offences.<sup>43</sup> Moreover, the modern trend towards strict liability is cliché.<sup>44</sup> Strict liability like vicarious liability generally can be justified on utilitarianism.<sup>45</sup> In addition, Nemerson claims that ‘strict liability may be justified by a pluralist theory of sanctions.’<sup>46</sup> The key benefit of strict liability is that ‘by imposing a burden on the regulated accused to establish due diligence, the strict-liability offence requires people to put

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<sup>41</sup> [1995] 1 All ER 918 at p. 928.

<sup>42</sup> Mueller, n. 9 at p. 21.

<sup>43</sup> Sayre, ‘Public Welfare Offenses’ 1933 33 Columbia L. R. 55-88 at p. 67.

<sup>44</sup> F. G. Jacobs, *Criminal Responsibility*, (1971), at p. 99; Schaff, ‘Indirect Criminal Conduct Of Corporate Officers’ 1988 13 Delaware Journal of Corporate Law 137-64 at p. 138.

<sup>45</sup> Ogus, *Legal Tradition And Economic Theory* (1994) at p. 82; N. Hawke, ‘Crimes Against The Environment’ 1987 16 Anglo-American L. R. 90-96 at p. 93; Iseman, ‘The Criminal Responsibility Of Corporate Officials For Pollution Of The Environment’ 1972 37 Albany L. R. 61-96 at p. 69; Webb, in Pearce and Snider (Eds.), *Corporate Crime: Contemporary Debates*, (1995), at p. 344; Hadden, ‘Strict Liability And The Enforcement Of Legislation’ 1970 Criminal L. R. 496-504; Hoggan, *Criminal Liability Without Fault* (1969), at p. 20; Jacobs, n. 44 at p. 105; Sayre, n. 43 at p. 70.

<sup>46</sup> S. S. Nemerson, ‘Criminal Liability Without Fault: A Philosophical Perspective’ 1975 75 Columbia L. R. 1517-77 at p. 1576.



proactive, preventive systems in place that tend to minimize the likelihood of offences arising.<sup>47</sup> Notwithstanding that there are perceived benefits, there are those only too willing to criticise the concept of strict liability.<sup>48</sup> Frank steering a middle course argues that there is a need to revisit strict liability as a basis for criminal liability with perhaps the substitution of civil penalties rather than criminal sanctions.<sup>49</sup> That approach, however, only offers a flinched compromise which fails to address fundamental questions as to the appropriateness of vicarious criminal liability.

Leigh acknowledges the common law jurisdictions' contribution in devising different ways of attribution of liability to overcome the fact that corporations cannot act for themselves. However, attribution brings with it a problem of distinguishing from the corporation's direct liability and its vicarious liability for the acts of agents or employees in the scope of their employment. The real problem in adopting an expansive approach, utilising a broad range of corporate agents is that 'it may be difficult to rebut the accusation that an enterprise is in effect being subjected to vicarious liability. But vicarious liability for serious crime is at variance with fundamental values embedded in both common law and civil systems.'<sup>50</sup> For all this it remains useful in respect of certain statutory offences and as such might well be retained in respect of those crimes as part of our system of corporate criminal liability on the basis of pragmatism and efficacy. In chapter 6 my outline model aspires to continue with existing statutory crimes and implicit in this is the acceptance that vicarious liability will remain for many of those offences.

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<sup>47</sup> Webb, in Pearce and Snider (Eds.), n. 46 at p. 344.

<sup>48</sup> 'The modern growth of a large body of offences punishable without proof of a guilty intent is marked with real danger. Courts are familiarised with the pathway to easy convictions by relaxing the orthodox requirement of *mens rea*. The danger is that in the case of true crimes where the penalty is severe and the need for ordinary criminal law safeguards is strong, courts following the false analogy of the public welfare offenses may now and again similarly relax the *mens rea* requirement, particularly in the case of unpopular crimes, as the easiest way to secure desired convictions.' Sayre, n. 43 at p. 79.

<sup>49</sup> Frank 'Choosing Between Criminal And Civil Sanctions For Corporate Wrongs' in Hochstedler (Ed.), *Corporations As Criminals* (1984) at pp. 90-92

<sup>50</sup> L. H. Leigh, 'The Criminal Liability Of Corporations And Other Groups: A Comparative View' 1982 80 Michigan L. R. 1508-1529 at p. 1514.



## 2.2 The Identification Doctrine

The second 'model' of criminal liability identified by Gobert and discussed in a plethora of writings is what is known as the 'identification theory.' The essence of this theory is that the corporation attains criminal liability through a direct connection between the company and the person responsible for the criminal harm. An individual or individuals are of sufficient standing that they are 'identified' with the company. This model of criminal liability is often referred to as the 'controlling mind theory' or the 'alter ego' doctrine.<sup>51</sup> As a method of ascribing criminal liability it is most famously expounded in *Tesco Supermarkets Ltd v Natrass*.<sup>52</sup> However, development of the concept can be traced to earlier cases. Lord Denning argued in *H L Bolton Co. Ltd v TJ Graham and Sons Ltd*<sup>53</sup> that,

'[A] company may in many ways be likened to the human body. It has a brain and nerve centre which controls what it does. It also has hands which holds the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of those managers is the state of mind of the company and is treated by law as such.'

Wells<sup>54</sup> pinpoints three earlier cases as being significant in the adoption of the alter ego doctrine- *DPP v Kent and Sussex Contractors*,<sup>55</sup> *R v ICR Haulage*,<sup>56</sup> and *Moore v Bresler*.<sup>57</sup> In *DPP v Kent and Sussex Contractors Ltd* the company was charged with an offence under a war time rationing regulation- Defence (General) Regulations 1939- with making a false mileage return to the petrol licensing authority. The offence required the imputation to the company of an intention to deceive. At the trial Justices had dismissed the case on the basis that the company was incapable of having the criminal mind necessary for this charge. On appeal it

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<sup>51</sup> See Farrar, *Farrar's Company Law*, (3rd Ed., 1991) at pp. 759-760; see also *Wings Ltd. v Ellis* [1985] 1 AC 272

<sup>52</sup> [1972] AC 153

<sup>53</sup> [1957] 1 QB 159

<sup>54</sup> C. Wells, 'Corporations: Culture, Risk And Criminal Liability' 1993 Criminal L. R. 551-566 at p. 559.

<sup>55</sup> [1944] 1 KB 146

<sup>56</sup> (1944) 30 Cr. App R 31

<sup>57</sup> [1944] 2 All ER 515

was contended by Counsel that companies were separate legal *persona* from their employees. They could only commit crimes through their employees and it was from them that the necessary criminal mind could be imputed. This argument was upheld by the court and in the process Viscount Caldecote CJ said 'it is unnecessary, in any view, to inquire whether it is proved that the company's officers acted on its behalf. The officers are the company for this purpose.'<sup>58</sup> In *R v ICR Haulage Co. Ltd* the company faced a common law charge of conspiracy to defraud. Following conviction the company appealed arguing that a company was incapable of committing such an offence. Again the court had to address the issue of whether a company could have the necessary mens rea for the commission in this instance of a common law offence. The opinion of the court was that it could. Macnaghten J said,

'[I]f the responsible agent of the company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend according to the authorities...his knowledge and intention must be imputed to the company.'

The third of the 1944 cases, *Moore v Bresler*, provides further illustration of judicial support for the proposition that the actings of officers of a company could confer criminal liability on their company through the operation of the 'alter ego' doctrine. In this case the crime involved a breach of the Finance Act 1940 which, like *Kent and Sussex Contractors*, necessitated an intention to deceive. The General Manager and the Sales Manager of a branch of the company sold, with the intention of defrauding the company, some of the company's goods. They then made a return in respect of purchase tax contrary to section 35 of the Finance (No2) Act 1940. Though it appears rather unfair it was determined that the company was no less liable for the actions of the employee's despite the fact that the wrong of the individuals concerned was directed as much against the company as against the State.<sup>59</sup>

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<sup>58</sup> See n. 55 at p. 155.

<sup>59</sup> P. C. Heerey, 'Corporate Criminal Liability - A Reappraisal' 1962 1 University of Tasmania L. R. 677 at pp. 681-2, suggests that the court went beyond the reasoning of Lord Haldane in *Lennard's Carrying Co. v Asiatic Petroleum Co. Ltd.* [1915] AC 705 cf. *Lloyd v Grace Smith and Co.* [1912] AC 716 (HL); see also Welsh, n. 10 at p. 359.

One can go back further to an even earlier authority to see both the formulation of the idea of an 'alter ego' doctrine and its relationship with vicarious liability. In *Lennard's Carrying Company Ltd v Asiatic Petroleum Company Ltd*<sup>60</sup> Viscount Haldane said,

'[A] company is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it may be so, that the person has an authority to co-ordinate with the board of directors given to him to co-ordinate under the articles of association. It must be upon true construction of that section in such a case as the present one that the fault or privity of somebody who is not merely a servant or agent for whom the company is liable because his action is the very action of the company itself.'

The modern authority generally accepted as the leading case in the United Kingdom on the 'alter ego' doctrine is *Tesco Supermarkets Ltd v. Natrass*. In this case the company was charged with an offence under section 11(2) of the Trade Description Act 1968. the substance of the offence was that the company had advertised goods for sale at a price less than the price on the goods actually for sale. Evidence disclosed that a branch of the company had run out of specially priced items and they had been replaced with similar items at their normal price and that the company's branch manager had authorised the action taken. As a consequence the goods on display were more expensive than the advertised price of the goods. Section 24 of the 1968 Act offers a defence to a section 11(2) charge. It states,

'In any proceedings for an offence under this Act it shall...be a defence for the person charged to prove- (a) that the commission of the offence was due to...the act or default of another person...and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence.' Section 20 of the same Act states that 'where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of...any director, manager, secretary or other similar officer of

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<sup>60</sup> [1915] AC 705

the body corporate... he as well as the body corporate shall be guilty of that offence.'

The company sought to rely upon the defence in the statute arguing that it had exercised due diligence and that the manager was 'another' for the purposes of the Act. In accepting the company's contention the House of Lords held that the manager was not sufficiently senior to constitute the 'controlling' mind of the company.<sup>61</sup> The decision in *Tesco Supermarkets v Natrass* has attracted considerable criticism. For example Gobert claims that,

'[T]he test of *Natrass* is under inclusive in that the range of persons within a large company who will possess the relevant characteristics to render the company liable will inevitably be a rather small percentage of those who work for the company. The consequence is that the company will be able to escape criminal liability for most acts of its employees. In large companies such as Tesco there will be many layers of management. No one person or persons at the centre can be expected to oversee the daily affairs of the hundreds of supermarkets which the company operates. Day to day decisions will perforce have to be entrusted to local managers. Yet this discretion, because it relates to the implementation of policy rather to its formulation, will not be sufficient to bring the branch manager within the test of *Natrass*. Under *Natrass* a business is inevitably converted into a legal defence. Further, by their decision their Lordships encourage a management structure which favours devolved decision-making- not for the theoretical merit, but because it will help to insulate the company from criminal liability.'<sup>62</sup>

*Natrass* represents a crude distinction between the 'hands' and 'brains' of the company. The distinction is a simple one and, for some commentators, one ill-suited to modern complex command structures. Gobert explains that the *actus reus* of the crime is more likely to be committed a much lower level than director level. Trying to match the *actus reus* committed by a lower level employee with the *mens rea* of higher level employees has a certain inconsistency of approach. Gobert again argues,

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<sup>61</sup> Support for Lord Reid's *Natrass* approach is invariably drawn from the Canadian case of *R v St Lawrence Corporation* (1969) 2 O R 305 where Schroeder J A said, 'if an agent falls within a category which entitles the Court to hold that he is a vital organ of the body corporate and virtually its directing mind and will in the sphere of duty and responsibility assigned to him so that his action and intent are the very action and intent of the company itself, then his conduct is sufficient to render the company indictable by reason thereof. It should be added that both the principle and authority this proposition is subject to the proviso that in performing the acts in question the agent was acting within the scope of his authority either express or implied.'

<sup>62</sup> Gobert, n. 2 at p. 400.

‘One of the prime ironies of *Natrass* is that it propounds a theory of corporate liability which works best in cases where it is needed least and works least in cases where it is needed most. The directors and managers of small companies who are most likely to satisfy the *Natrass* test are also likely to be directly involved in carrying out of the company’s affairs and thus criminally liable in their own right; vicarious and corporate liability are largely superfluous for deterrent purposes. In large companies, on the other hand, there is far less likelihood of personal involvement by senior management in day-to-day activities. As a result, the possibility of personal criminal liability is not much of a deterrent while the *Natrass* test frustrates efforts to impose corporate liability.’<sup>63</sup>

Gobert cites the Clapham railway disaster as an illustration where the *Natrass* ratio is ineffective. In this incident the immediate fault of the accident was traced to faulty wiring. However, the technician’s failure had been replicated by many other technicians. None of them had been warned of their conduct or received any notification that their work patterns were in direct violation of the company’s stated policy. It became apparent in the course of the investigation that neither the technician nor his supervisor had seen the company’s policies. Despite an underlying picture of a company lacking in commitment to health and safety, or one simply paying ‘lip service’ to it, no prosecutions were forthcoming (despite a finding of unlawful killing at the inquest). This failure to prosecute may, in part, be explained by the difficulty in satisfying the *ratio* of *Natrass*. On the basis of that decision it was likely that the technician would not be viewed as the controlling mind of the organisation but rather merely a servant.

Muir notes that *Natrass* creates a discriminatory rule in favour of the larger employer.<sup>64</sup> In addition he notes one of another of the unfortunate consequences of *Natrass* and that is ‘If the corporation can expect to escape liability on proof of a servant’s fault it may be less inclined to do no more than maintain an adequate “paper” system for presentation to the court as evidence of due diligence on its part or perhaps of the defendant being “another person”.’<sup>65</sup> Field and Jorg criticise the identification doctrine on the basis that it does not adequately reflect the limits of

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<sup>63</sup> Gobert, n. 2 at p. 401.

<sup>64</sup> Muir, ‘*Tesco Supermarkets, Corporate Liability And Fault*’ 1973 5 New Zealand Universities L. R. 357-372

<sup>65</sup> Muir, n. 64 at p. 367.



corporate moral responsibility.<sup>66</sup> In their view to limit it to high ranking corporate actors is unduly restrictive and that, 'priorities in hierarchical organisations like corporations are set predominately from above. It is those priorities that determine the social context within which a corporation's shop-floor workers and the like make decisions about working practices. A climate of safety or unsafety may permeate the entire organisation but be created at the highest level. Thus, if criminal law is to reflect this moral responsibility, in appropriate cases legal responsibility ought to extend to acts done by the "hands" of the corporation.' Fisse is also critical of the identification theory describing it as a,

'vision which is blind to organizational theory and practice [amounting]..to an anthropomorphic illusion...The truth is that corporations are materially different from human persons both in constitution and being. To rely upon anthropomorphic assumptions at the expense of corporate reality is simply to succumb to the myth of the metaphor.'<sup>67</sup>

One of the perceived problems of the identification theory is that following the *Natrass* decision there is clear authority for suggesting that only those at the very core of the corporation may impute guilt to it.<sup>68</sup> So far, as one writer has pointed out '[n]o indication is apparent for what criteria are to be employed in determining who falls within the "inner circle".'<sup>69</sup> Plausibly each situation may turn on its merits but there is no authority to that effect from the House of Lords or, the Scottish Court of Criminal Appeal. What then might be the criteria for 'identification'? How might one develop a blueprint for determining whose criminal mind will attach liability to the company? Stern offers several criteria for defining the 'organ' which will attach liability. First, rather unhelpfully Stern offers 'vague description' as one means of identifying the appropriate individuals. There is little difficulty in finding support for this vague rather haphazard approach. The case law, particularly English case law, points to the court offering

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<sup>66</sup> S. Field and N. Jorg, 'Corporate Liability And Manslaughter: Should We Be Going Dutch?' 1991 Criminal L. R. 156-171 at p. 159.

<sup>67</sup> Fisse, n. 8 at p. 366.

<sup>68</sup> Wells, 'A Quiet Revolution In Corporate Liability For Crime' 1995 145 New Law Journal 1326-1327 at p. 1326; cf. *Henshall (Quarries) Ltd. v Harvey* 1965 2 QB 233; *R v Weatherfoil Ltd.* [1972] 1 All ER 65; see also Schaff, n. 44.

<sup>69</sup> Y. Z. Stern, 'Corporate Criminal Personal Responsibility - Who Is The Corporation?' 1987 13 Journal of Corporation Law 125-43 at p. 131.



up such nebulous concepts as “the very ego and centre”, “the directing mind and will” or “control centre” or corporate “brains” or the “primary organs.” As Stern suggests there is frustration in defining the organ as something more than other employees of the corporation.<sup>70</sup> It has been suggested that the primary organs test dictates that the criminal mind is to be located in the minds of ‘those agents who can act under the direct authority of the constitutional document and regulations of the corporation without the intervention of any further human act.’<sup>71</sup> Such a test was advanced by Lord Diplock in *Natras*. The test itself suffers from the same issues which *Natras* generally raises. Primary organs may have very little direct input into the actings of the company. They may exercise nothing more than mere approval. Others within the organisation may exercise considerable power and indeed may be considered organs of the company without being primary organs of the company. Conversely, lower order officials may have significant powers in modern bureaucracies. Such officials might not be named in corporate documents but may, nonetheless exercise considerable power. It seems fairly obvious that primary organs are not the sole organs particularly in complex modern bureaucracies. Fisse criticises Lord Diplock’s confinement of corporate officers to the formal constitution as resting on the patently false assumption that a corporation’s constitution reflects the true nature of its managerial functions.<sup>72</sup> The major appeal of such a test is the certainty that it offers in identification. Only those expressly named in company documents would have the power to attach criminal liability to the company. The limitations of this approach are self-evident; a company could evade liability by being economical with the number of named officials. Equally objectionable is the notion the company alone may determine who can create criminal liability. Policy considerations in criminal law dictate that the State should determine the parameters of criminal liability and it clearly offends

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<sup>70</sup> Stern, n. 69 at p. 132; *DPP v Kent and Sussex Contractors Ltd.* *supra*

<sup>71</sup> Powell, *The Law Of Agency*, (1961).

<sup>72</sup> Fisse, ‘*Consumer Protection And Corporate Criminal Responsibility: A Critique Of Tesco Supermarkets v Natras*’ 1971 4 Adelaide L. R. 113-129 at p. 121; *Tesco Supermarkets Ltd. v Natras* per Lord Diplock at p. 199 ‘The obvious and only place to look to discover by what natural persons its powers are exercisable, is in the constitution.’; see also *Seaboard Marine Offshore Ltd. v Secretary of State for Transport* [1994] 2 All ER 99 at p 104; for a full discussion of the distinction between manager and officer see *R v Boal* [1992] 3 All ER 177.

that concept were the corporation to self-regulate its liability by narrowing the numbers of individuals who may be identified with the corporation.

An alternative test offered by Stern is the delegation test.<sup>73</sup> This test retains a linkage to company documentation. The nexus with the company documents conveys an image of certainty and express identification. In this instance identification with the company would be through those thought to have delegated from the company documents. The flaw in such a test is the lack of precision. The flexibility it introduces permits courts to deduce in the given circumstances who has the delegated authority. The lack of precision reduces the test to little more value than the vague description approach currently adopted by the courts.

Stern thirdly, offers the 'authorised acts test.'<sup>74</sup> Here one inevitably observes the language of vicarious liability rooted in the law of agency. Identification is with the acts authorised by the primary representatives rather than those carried out by them. As a consequence any employee of the organisation might be identified as the mind of the company. Unlike the other tests this one has its affinity to the acts perpetrated rather than the individuals. In this sense it is less anthropomorphic in conception. The authorised acts test's primary flaw lies in the fact that only directly authorised acts attach criminal liability; generally authorised acts will not attach liability. Even if the test had some merit it would nonetheless raise questions as to the mode of authorisation and more importantly, unauthorised acts.

Another of Stern's tests - 'corporate selection test' - is in many respects similar to the primary organs test in that it permits the corporation to determine who the organs are. The approach entails the corporation filing with State authorities (obviously Companies House in the UK) documents identifying the organs by name or position. The poverty of this as a basis of identification is obvious; the criticisms which pertain to some of the earlier tests are apposite. This approach

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<sup>73</sup> Stern, n. 69 at p. 133.

<sup>74</sup> Stern, n. 69 at p. 133.

would amount to nothing more than self-regulation and would in the opinion of the writer prove so ineffectual as to be meaningless.

Stern also offers what he calls 'a pragmatic approach.'<sup>75</sup> Arguably, the current approach of the British courts is one based on pragmatism. The strength and weakness of such an approach is adequately described by Stern who contends 'its strategy might give more substance to the abstract descriptions of the organ, while softening the formal criteria's intransigence.' The pursuit of a suitable test however is premised on the premise of greater certainty. Abstraction clearly cannot achieve this and for that reason alone this test must be of limited value for those in pursuit of definition. Stern suggests that in adopting a pragmatic approach,

'[T]he criterion must enable the courts to identify the organs on a case by case basis, by engaging in a factual analysis and careful investigation of the structure and the functions of the corporation in question. Nevertheless, the criterion must not be so abstract that it allows too much judicial discretion.'

Pragmatism as a test, if such a test exists, may require certain constraining features which for the purposes of this study may be described as sub-tests. Stern concludes that,

'[T]he common goal of all the criteria analysing the hierarchy of the legal body is to identify those individuals who are sufficiently important in the corporate hierarchy that their will and acts might be considered those of the corporations itself. The complex task is to draw the exact line in the hierarchy which separates individuals who are the ego of the corporation from those who are merely its representative.'<sup>76</sup>

This may be so for those supportive of the identification theory. Stern's approach is to find a test which works within that context. Others have sought a different formulation entirely for the ascription of criminal liability and have rejected the identification theory as inherently inappropriate and unworkable. Stern in an effort to make the pragmatic test work offers two constraining reference points: analysis of hierarchy and analysis of function. Illustration of the pragmatic approach in

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<sup>75</sup> Stern, n. 69 at p. 134.

<sup>76</sup> Stern, n. 69 at p. 135.

respect of hierarchy can be found in the Model Penal Code in America which states that,

‘A corporation may be convicted of the commission of an offence if and only if...(c) the commission of the offense was authorized, requested, commanded, or performed by the board of directors, or by an agent having responsibility for formation of corporate policy, or by a high managerial agent having supervisory responsibility over the subject matter of the offence and acting within the scope of his employment in behalf of the corporation.’

Like most hierarchical analysis the Code fails to differentiate the real policymakers.<sup>77</sup> There are inherent contradictions in the conception of hierarchy and pragmatism. Another major criticism is the inequality in merely ascribing liability on the basis of function.<sup>78</sup> Welsh contends that there are some actions of those within the hierarchy which should not attach criminal liability to the corporation despite the fact that the functionary is acting within the scope of his employment. Nonetheless analysis by function may ironically be more utilitarian than pragmatism.<sup>79</sup> Here we consider not who the individual is but what he does regardless of his position in the hierarchy. This seems more truly a pragmatic approach. Of equal importance is whether the function performed is of the corporation or for the corporation. In the spirit of true pragmatism Stern offers a solution to the inherent deficiencies of the hierarchical and function tests and that is to combine both.<sup>80</sup> He argues for an approach to this vexed question whereby ‘an analysis of the corporation’s function will eliminate from the sphere of corporate personal liability not only *ultra vires* acts or acts outside the scope of an actor’s employment, but also *intra vires* acts which are not attributable to the corporation’ and,

‘..because common sense and practical economic necessity sometimes require rejection of the results reached by the function test alone.. and because the criminal law’s deterrent goal will not be achieved by expanding corporate liability to case where low-ranking employees are the actual criminals, an additional hierarchy test should be applied...[T]he two criteria complement each other because each of them alone is too broad

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<sup>77</sup> Stern, n. 69 at p. 136.

<sup>78</sup> Advanced by Welsh, n. 10 at p. 360.

<sup>79</sup> The function test was developed by Professor Barak, ‘*The Status Of The Entity In Torts*’ 1966 22 *Hapraklit* 198 at pp. 204-7.

<sup>80</sup> Stern, n. 69 at p. 140.

and inflexible to accommodate the complex and diverse structure of the modern corporation.’<sup>81</sup>

Kelly notes the difficulty of identifying individuals to attach corporate liability under alter ego doctrine. His solution is a definition in terms of control and management which he believes would address the differential that exists between different corporations.<sup>82</sup> Leigh recognises the organs of the company as,

‘those persons who, by the constitutional documents of the corporation, are entitled to the primary management of its affairs’ but equally “[T]he difficulty with this formula is that it does not fit the case of the large decentralised corporation in which decisions of importance may well be taken by middle-range managerial officers who are answerable only in some ultimate sense to board members.’<sup>83</sup>

What about persons who manipulate the company without occupying a formal position in it? Will they be liable under the identification theory. Leigh following the line in *R v St Lawrence Corp.* adopts the view that it is correct to restrict the identification theory to employees acting within the scope of their employment or his authority. However, he goes on to say that the real question is ‘whether a corporation should be held liable simply because the agent was acting within the scope of his authority or in the course of his employment.’<sup>84</sup> Leigh’s argument is that,

‘The doctrine of identification originated as a device to ascribe personal liability to corporations where this was necessary in order to hold them civilly liable. In criminal law, however, it tends to be assumed that the doctrine means that for all purposes of criminal liability a corporation possess a mind- that of its controllers. But a court could return to the original root and hold that the doctrine of identification should apply only where for policy reasons it is necessary to hold a corporation liable.’<sup>85</sup>

The distinction between vicarious liability and primary liability is both significant and important. Writing before the landmark case of *Natras*, Fisse indicated that

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<sup>81</sup> Stern, n. 69 at p. 143.

<sup>82</sup> Kelly, ‘Corporate Manslaughter And UK Common Law: Lessons To Be Learned From Our Experience?’ 1991 6 OGLTR 177-87 at p. 179.

<sup>83</sup> L. H. Leigh, ‘The Criminal Liability Of Corporations And Other Groups’ 1977 9 Ottawa L. R. 247-302 at p. 254.

<sup>84</sup> Leigh, n. 83 at p. 257.

<sup>85</sup> Leigh, n. 83 at p. 261.



'[o]nce a distinction is drawn between primary and vicarious liability it clearly follows that the conduct of some servants or agents cannot be imputed to a corporation where primary liability is imposed. Authority is to the effect that primary (as opposed to vicarious) liability may be imposed in respect of the conduct of a managing director, a general manager, and even a secretary. Obviously primary liability would be imposed in respect of the conduct of either the general meeting or the board of directors. However, no clear discrimination between superior and inferior agents or servants emerges from the case law.'

Fisse appeared supportive of the distinction between vicarious liability and primary liability on the basis that it would prevent the 'wider imposition of vicarious liability upon individuals.'<sup>86</sup> Edgerton had earlier offered a rationale in favour of primary liability. In his view it would enhance the notion of deterrence if the corporation was held directly criminally liable. Moreover, it would operate to influence shareholders and higher officials to subordinate lower ranking officials. Finally, Edgerton saw the advantage in primary liability in the fact that it would overcome the need to identify the person who commits the *actus reus*.<sup>87</sup> Fisse is critical of Edgerton's view on the basis that the latter's position offered no thesis as to why corporate criminal liability should be expanded more widely than individual liability.<sup>88</sup> In respect of Edgerton's third point, it is interesting to note that Fisse was critical on the basis that it may lead to the elimination of *mens rea* from offences simply because it is difficult. The experience since Fisse's early thesis has not borne out his criticism. Indeed, deeper analysis points to the fact that identification with all corporate agents and servants need not of necessity result in the dispensing of the requirement of *mens rea* where the alleged crime has such a requirement. The attribution of primary liability in the modern era has been indicative of a desire to root out the criminal mind within the corporation and not to eliminate *mens rea* as a requirement altogether. Fisse's conclusion in 1967 was that 'primary liability..should be imposed only in respect of the conduct of the general meeting, the board of directors and less clearly the managing director.' That conclusion represented a prognosis which the House of Lords in *Natras*

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<sup>86</sup> Fisse, 'The Distinction Between Primary And Vicarious Corporate Criminal Liability' 1967 41 Australian L. J. 203-210.

<sup>87</sup> Edgerton, 'Corporate Criminal Responsibility' 1927 36 Yale Law Journal 827-844

<sup>88</sup> Fisse, n. 86



seemed relatively eager to adopt. Leigh argues that 'The reasons for differing between personal and vicarious liability are partly dialectical and partly founded on policy i.e. the desire to impose personal corporate liability rather than vicarious liability in a situation stemming essentially from a failure to supervise officers, agents and employees. A broad test is in part dictated by the view that ignorance by top management of the criminal activities of subordinates is often founded on expediency.'<sup>89</sup> According to Leigh 'The question is not whether the relevant human actor occupies a particular place within the corporation, but whether, whatever his title, he exercises substantially autonomous powers in respect of a significant aspect of the corporation's activities.'<sup>90</sup>

It has been suggested that 'The simplest and most sensible explanation is that the identification liability is a modified form of vicarious liability under which the liability of a restricted range of personnel is imputed to the corporation.'<sup>91</sup> The Law Commission's Working paper No 44 argued for an extension to the identification theory so that corporate actors other than board members would be included. Their formulation was to include those managers where the management function delegated was substantial<sup>92</sup> They also wished to overturn the *Moore v Bresler* doctrine so that where the individual actor seeks to harm the corporation then their actions could not be attributed to the corporation.

In New Zealand there are authorities which offer an interesting contrast with *Tesco Supermarkets v Natrass*. In *Meulens Hair Stylists v Commissioner for Inland Revenue*<sup>93</sup> the court adopted a test of 'responsible servant' (in this case the company secretary). Similarly, in *Upper Hutt Motor Bodies Ltd v CIR*<sup>94</sup> McGregor J. emphasised the notion of empowerment rather than the corporate brain idea.<sup>95</sup>

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<sup>89</sup> Leigh, n. 83 at p. 255.

<sup>90</sup> Leigh, n. 83 at p. 255

<sup>91</sup> Colvin, 'Corporate Personality And Criminal Liability' 1955 6 Criminal Law Forum 1-44 at p. 13.

<sup>92</sup> Andrews, 'Reform In The Law Of Corporate Liability' 1973 Criminal L. R. 91-97 at p. 96.

<sup>93</sup> [1963] NZLR 797.

<sup>94</sup> [1964] NZLR 953

<sup>95</sup> See also *Morris v Wellington City* [1969] NZLR 1038; *Sweetman v Industries and Commerce* dept [1970] NZLR 139 where Richmond J held that the internal arrangements between the hands and the brains were irrelevant and that directors could not hide behind ignorance.

Contrast this with the UK decision in *R v Redfern and Dunlop Ltd.*<sup>96</sup> where it was held that the European Sales Manager of Dunlop (Aviation) Ltd was not sufficiently senior to be the alter ego of the company. However, two recent cases have accepted the attribution of knowledge to lower level officials. In *Tesco v London Borough of Brent*<sup>97</sup> and *El Ajou v Dollar Land Holdings Plc.*<sup>98</sup> In *Tesco Supermarkets Ltd v London Borough of Brent* the company was charged with an offence contrary to section 11(1) of the Video Recordings Act 1984 whereby one of their employees sold a video classed '18' to a 14 year old. Saughton L.J. offered the view that it was 'absurd to suppose that those who manage a vast company would have any knowledge or any information as to the age of a casual purchaser of a video film. It is the employee that sells the film at the check out point who will have knowledge or reasonable grounds for belief. It is her knowledge or reasonable grounds that are relevant.' Such a view is difficult to reconcile with the *Natras* doctrine and illustrates the incoherence of adopting the *Natras* approach. In *El Ajou*, Nourse L.J. adopted a practical view of a complex financial fraud and in the process held that it was not the board of directors that was the controlling mind but the person who had *de facto* management. According to Nourse 'the authorities show clearly that different persons may for different purposes satisfy the requirements of being the company's directing mind and will.' In *Camden London Borough Council v Fine Fare Ltd* a slightly different approach was adopted. The case essentially endorsed the *Natras* view that it was the directors who were the controlling mind but Glidewell J suggested that officers below the rank of director might be in a position to indicate what the state of mind of the directors was. In *R v Redfern and Dunlop Ltd*<sup>99</sup> the court re-emphasised the notion of control claiming that 'administrative or executive functions which did not confer true power of management and control would be insufficient.' These most recent cases illustrate the clear problems that a strict interpretation of the *Natras* doctrine creates. There is no certainty in just who the controlling mind of the corporation is. In the process

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<sup>96</sup> (1993) Crim L. R. 43.

<sup>97</sup> [1993] 2 All ER 718

<sup>98</sup> [1994] 1 BCLC 464

<sup>99</sup> (1993) Crim. L. R. 43 at p. 45

of seeking accommodations with the *Natrass* philosophy the case law is becoming confused and confusing. In respect of the *Natrass* doctrine Wells claims that,

‘The idea that only certain people act as the company presents a problem over and above the difficulties attending any such line-drawing exercise. While the company is at one level a “fiction” it is at another real. Once individuals in the company do anything which is part of the greater enterprise of which they are a part, then they contribute to the corporate effect. Whatever the branch manager of Tesco did with special offers..he was only able to do so because the company had invested and maintained the shop, the supplies to it, the posters advertising the offer and so on. When the Assistant Bosun on the Herald of Free Enterprise slept instead of doing his job, he was caught up in a past, present and future, a network of obligations and implications, which the corporation for which he worked provided not only the equipment and the *raison d’être* but also the operating rules and procedures. The notion that some working within that structure act as that corporation while others do not is flawed and requires re-examination in the context of imposing criminal liability.’<sup>100</sup>

Quite simply the identification theory ignores the reality of modern corporate decision-making which is often the product of corporate policies and procedures rather than individual decisions.<sup>101</sup> Both the Hidden Report into the Clapham Junction railway disaster and Fennell Report into the Kings Cross Fire as well as the Shehan Report in the Zeebrugge ferry disaster illustrate how processes for decision making at the highest level contributed to failures of subordinates which led to major incidents.<sup>102</sup> It seems trite to suggest that organisational contexts and collective processes considerably influence the actions of minor individuals within those organisations. All of those disasters displayed a measure of acceptance primarily through ignorance and indifference and casualness. In all the situations there was no question that the corporations had the power to influence or control what the subordinates were doing.

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<sup>100</sup> Wells, n. 54 at p. 560.

<sup>101</sup> C. Clarkson, ‘Kicking Corporate Bodies And Damning Their Souls’ 1996 59 Modern L. R. 557 at p. 561.

<sup>102</sup> See Field and Jorg, n. 66 at pp. 168-9.

Whilst the identification theory is not without its supporters,<sup>103</sup> it has attracted considerable criticism. In Britain it retains a pivotal position as the main method of ascribing liability for common law crimes. As a doctrine it has undergone little modification since it was first mooted in 1915.<sup>104</sup> For all that, it should not 'occasion surprise that scholars elsewhere refuse to treat liability ascribed through identification or high managerial agent as truly personal'... 'To many European scholars..the common-law systems seem to have set the theoretical problems aside rather than to have solved them.'<sup>105</sup> Fisse, in response, argues that identification should be abandoned as not coinciding with the possible justifications of corporate criminal responsibility.<sup>106</sup> *Natrass* prevents imposition of liability where it is justified and allows imposition where it is unnecessary.<sup>107</sup> More significantly, the *Natrass* principle fails to reflect the concept of organisational blameworthiness so inherent in much of corporation's criminal conduct.<sup>108</sup>

### 2.3 The Aggregation Model

The aggregation model represents an extension to the identification model whereby the criminal mind is identified in the collectivity of corporate personnel. Stone explains the essence of aggregation claiming,

'All that is needed..is the stipulation that some critical mass of members of any aggregate collectivity has collective power with respect to most outcomes of the matters in which the collectivity has collective power...each member of that critical mass subgroup has some individual power as well with respect to those matters..in actual cases group dynamics and the personal power over others of individual members may serve to exclude certain members from ever being in the critical mass..Allowing that we may have to exclude certain members who are notably weak or under the influence of others, we may say that if an aggregate collectivity has collective power with respect to some matter, each member of the aggregate has some individual power with respect to that matter; that is, none are powerless.'<sup>109</sup>

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<sup>103</sup> In 1985 The English Law Commission published a Draft Code of the Criminal Law which incorporated an earlier (1972) Working Party Report into Corporate Criminal Liability. In the Code they opted to retain the alter ego doctrine. ( see Kelly, n. 82 at p. 177).

<sup>104</sup> Kelly, n. 82 at p. 178.

<sup>105</sup> Leigh, n. 16 at p. 1527.

<sup>106</sup> Fisse, n. 72 at p. 127.

<sup>107</sup> Fisse, n. 72 at p. 127

<sup>108</sup> Fisse, 'Recent Developments In Corporate Criminal Law And Corporate Liability To Monetary Penalties' 1990 13 University of New South Wales J. 1-41 at p. 3.

<sup>109</sup> Stone, *Where The Law Ends* (1975) at p. 73.

The aggregation theory has American ancestry.<sup>110</sup> The leading American case is *US v TIME-DC Inc.*<sup>111</sup> where the court said,

‘[K]nowledge acquired by employees within the scope of their employment is imputed to the corporation. In consequence, a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then should have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.’

The doctrine continues to find favour in some modern American case law. In the case of *United States v Bank of New England*<sup>112</sup> the company had organised its operations in such a way that individual employees were responsible for different operations in respect of matters which required to be reported under the Currency Transaction Reporting Act. In finding the Bank guilty, the court imputed knowledge to the bank by aggregating the knowledge of the employees. The court said,

‘[I]f employee A knows one facet of the currency reporting requirement, and B knows another facet of it, and C a third facet of it, the bank knows them all’... ‘A collective knowledge is entirely appropriate in the context of corporate criminal liability...Corporations compartmentalise knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation’s knowledge of a particular operation.’<sup>113</sup>

In Britain there has been no judicial support for the aggregation theory in criminal cases.<sup>114</sup> The one major case where the circumstances seemed most appropriate for

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<sup>110</sup> Gobert n. 2 at p. 404; see *State v Morris and East Sussex Railway* 23 NLJ 360 (1850) Green C J referred to the ‘body aggregate.’

<sup>111</sup> 381 F Supp 730 WD Va (1974)

<sup>112</sup> 821 F2d 844 (First Cir) cert. denied 484 US 943 (1987)

<sup>113</sup> *US v Bank of New England supra* at p. 855.

<sup>114</sup> But for tacit support of aggregation theory see *Armstrong v Strain* [1952] 1 KB 232; *London Country Freehold v Berkley Properties* [1936] 2 All ER 1039; *Woyka v London and Northern* 1922 10 Lloyds Rep 110; Aggregation supported by civil case of *WB Anderson and Sons Ltd. v Rhodes (Liverpool) Ltd.* [1967] 2 All ER 850 cf. *Armstrong v Strain* [1952] 1 KB 232; *R v HM Coroner for East Kent ex p Spooner* (1989) 88 Cr. App R 10 at 16-7; *Seaboard Offshore Ltd. v Secretary of State for Transport* (1993) 1 WLR 1025; Nor has Aggregation been accepted in Commonwealth countries see *Colvin*, n. 91 at p. 19, Specifically, it was rejected in *R v Australasian Films Ltd.* 29 CLR 195 (1921).



its adoption was in the cases that followed the Zeebrugge Ferry disaster. However in *R v HM Coroner for East Kent ex.p. Spooner*<sup>115</sup> Bingham J. said,

‘Whether a defendant is a corporation or a personal defendant, the ingredients of manslaughter must be established by proving the necessary mens rea and *actus reus* of manslaughter against it or him by evidence properly to be relied on against it or him. A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such.’

Gobert argues that aggregation provides an alternative and more intellectually satisfying basis than the alter ego doctrine for attributing the knowledge of a corporate official to the company.<sup>116</sup> He does so on the basis of the obvious limitations of the *Natrass* decision where the controlling mind is equated with seniority of position. Under the aggregation theory more junior officials and other servants of the company can form part of the collective knowledge or mind of the company. Secondly, the aggregation theory has appeal where no single individual within the company is in possession of all the facts or information.<sup>117</sup> Only by aggregating knowledge does the fuller picture emerge. One of the consequences of this approach may be that the sum of the knowledge may be greater than the parts.<sup>118</sup> Clearly, there are dangers in such an approach and undoubtedly, the dangers have been a contributory factor in judges such as Bingham J. not accepting the concept of aggregation.<sup>119</sup> Smith and Hogan oppose the doctrine of aggregation in offences requiring intention, recklessness or knowledge whilst conceding it may be applicable in negligence.<sup>120</sup> Likewise, the Model Criminal Code prepared by Criminal Law Officers Committee in Canada hinted at aggregation in negligence.<sup>121</sup> There are other features of aggregation which are

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<sup>115</sup> (1989) 88 Cr. App R 10

<sup>116</sup> Gobert, n. 2 at p. 405.

<sup>117</sup> Gruner, *Corporate Crime And Sentencing* (1994) at pp. 36-7

<sup>118</sup> Gobert, n. 2 at p. 405

<sup>119</sup> See *Armstrong v Strain* [1952] 1 KB 232 at p. 246

<sup>120</sup> Smith and Hogan, *Criminal Law* (1992) at p. 184.

<sup>121</sup> Proposals to Amend the Criminal Code (General Principles) 1993 ‘if the conduct of the body corporate when viewed as a whole (that is by aggregating the conduct of a number of servants, employees or officers) is negligent’ clause 22 however it goes on a corporation is negligent when ‘one or more of its representatives, having an express or implied authority to direct, manage or control its activity in the area concerned, and in the execution of that authority, fail, individually



troublesome. A primary question is whose knowledge should be aggregated ? Would courts adopt the *Natrass* approach and simply view senior executives as the individuals whose minds could be aggregated to form the necessary *mens rea*. In many respects such an approach diminishes the perceived benefit of aggregation as a model of criminal liability. The 'brains' of the company are in a position to put in place the necessary accounting procedures and policies whereby practices can be brought to their attention of senior executives. If the aggregation model did not concede the possibility of aggregating knowledge from outside the small coterie of senior executive those self same executives could 'insulate a company from liability by isolating themselves from their employees and the dangers of which the latter would be aware.'<sup>122</sup> It seems only fair that where a company through its senior officers puts in place appropriate systems and procedures that they should where the occasion merits it, be able to rely upon the defence of due diligence.

Aggregation reflects 'the "atomistic" element in our common-sense conception of organisations. It correctly 'insists on the critical dependence of organizations both phenomenally and normatively, on the actions and interrelations of individual human being. However, by equating organizations to a homogeneous group of individuals, aggregation vastly understates the extent and the significance of the complexity and inscrutability of that dependence.'<sup>123</sup> In the prosecution resulting from the Zeebrugge Ferry disaster one finds an illustration where the court rejected the notion of aggregation of knowledge to the company and dismissed the prosecution in part because the court was not convinced that senior management ought to have known that there was a serious risk of the shipping sailing with its bow doors open. Despite the fact that some ship masters had been concerned about sailings with the bow doors open, there was no evidence that this had been brought to the attention of the senior executives of P & O. The ability to defend on the basis of an absence of *mens rea* essentially on the basis of 'blissful ignorance' has been extensively criticised. Gobert for example argues, that 'the court converted a

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or collectively, to the degree applicable to that offence, to exercise reasonable care to prevent an occurrence.'(cl 22(2)(b))

<sup>122</sup> Gobert, n. 2 at p. 406.

<sup>123</sup> Dan-Cohen, *Rights, Persons And Organizations*, (1986) at p. 27.

*mens rea* bordering on 'wilful blindness' into an affirmative defence, and rewarded culpable ignorance in a situation where it should have been structuring the law to encourage corporate diligence.'<sup>124</sup>

Lederman is critical of the aggregation theory on the basis that it 'might lead to the conviction of legal bodies under far-reaching and absurd circumstances..The trend that allows the conviction of a corporation of a corporation by piecing together the conduct of different agents so as to form the elements of one offence is the result of over-personification of corporate bodies.'<sup>125</sup> Lederman is also critical of aggregation because of the lack of concurrence in the integral components of the crime. There must in her opinion be a causal relationship between the *mens rea* and the *actus reus*. She argues,

'The artificial process of "piecing together" whereby the *mens rea* and *actus reus* of an offense are attributed to the corporation cannot satisfy the demands of the principle of concurrence. Even the proponents of corporate criminal liability concede that the corporate entity cannot by itself produce the elements necessary to consummate the crime. These elements must first evolve in the minds and actions of the perpetrators and only then, by way of legal fiction of identification or imputation, are they attributed to the corporation. Hence, the link required by the concurrence principle must also be supplied first by the organ or agent and only then can it be ascribed to the corporation. However, when the knowledge vital to formation of the link is obviously not manufactured by any human consciousness and it cannot, therefore be claimed that the criminal mind stimulated the forbidden act.'

Where aggregation is not possible Field and Jorg argue that 'Collective responsibility becomes lost in the crevices between the responsibilities of individuals.'<sup>126</sup> There is also merit in the proposition that aggregation is more extensive than vicarious liability because it does not require an offence to be perpetrated by an individual.<sup>127</sup> Its real merit lies in the somewhat more collectivist approach than either vicarious liability or the identification doctrine. Nevertheless, in common with those approaches, it suffers from the fact that it is

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<sup>124</sup> Gobert, n. 2 at p. 407; see also Field and Jorg, n. 66 at p. 161.

<sup>125</sup> Lederman, n. 5 at p. 306.

<sup>126</sup> Field and Jorg, n. 66 at p. 162.

<sup>127</sup> Sullivan, 'Expressing Corporate Guilt' 1995 15 Oxford Journal of Legal Studies 281-93 at p. 287.

but another search for the essence of corporate liability rooted in, and routed through, the individuals within that organisation.

## 2.4 Corporate Fault

All of the foregoing three theories suffer from limitations; they are atomistic rather than holistic. They rest on the premise on designation of individuals whose acts and mental states can be attributed to the company. Corporate criminal liability is in all three a derivative form of liability.<sup>128</sup> All three theories suffer from the linkage of individual liability to corporate liability through the concept of juristic person. It is because of these limitations and from the desire to have an equitable premise for corporate criminal liability extendible to all forms of corporate criminal activity that scholars have considered a corporate fault model.<sup>129</sup> The perception is that the attribution of fault or blame in corporate crime more properly requires to focus on collective corporate blame rather than via the blameworthiness of individuals. If fault underlines individual liability, why should it not precede corporate liability?<sup>130</sup> The nexus between the corporations and the individuals within it needs to be broken or, in any event redefined. The preoccupation of fitting individualised liability to the corporate form is fraught with difficulty. History points to problems with all three of the foregoing 'atomistic' models of corporate liability. These models have had limited success in providing a juristic basis of liability for corporations criminal acts. It is dissatisfaction with all three that has led commentators to offer a fourth basis on which criminal liability can be attributed to the corporate form. Fisse argues that,

'[I]n the case of corporate criminal responsibility, too little attention has been paid to the possibility of improving the efficacy and justice of its operation. To begin with, our existing ideas upon criteria of ascription of responsibility are fragmentary and primitive. This is true of the central issue of primary vs. vicarious responsibility, as well as the subsidiary problems raised by the agency relationship between a corporate accused and the individual person or persons whose conduct or fault is the subject of attribution, fault concepts and defences in their application to

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<sup>128</sup> Gobert, n. 2 at p. 407.

<sup>129</sup> Colvin, n. 91 at p. 41

<sup>130</sup> Gruner, n. 117 at pp. 80-2

corporations, offences in their application to corporations and the criminal capacity of various types of organisations.’<sup>131</sup>

The theory of corporate fault is one essentially based on collective fault. The company as a whole has liability not by the actions or intentions of individuals within but rather through expressions of the collective will of the company. The most obvious place for such expressions of intent to be found are in company policies and procedures. The development of company policy invariably requires the passage of that policy through an amalgam of individuals and sub-groups within the organisation. Any policy so arrived at may represent either a synthesis of views or a compromise of views.<sup>132</sup> Where the company’s mind is equated with the policies of the company, such policies represent expressions of corporate intention. If through their operation, a criminal act ensues, the theory says that the company will be liable. Clearly, such a model of corporate fault can apply in a whole range of circumstances and can be applied to both common law crimes and statutory crimes. The obvious lacuna is where the company does not have formalised policies at all or does not have policies pertaining to particular aspects of its activities. The great benefit of moving towards to a corporate fault model of corporate crime lies in the fact that it will loosen corporate criminal liability from its ‘anthropomorphic moorings.’ Gobert argues that,

‘[C]ompanies should bear responsibility for crimes occurring in the course of their business without the need for the Crown to attach fault to specific persons within the company. It should be the company’s responsibility to collect information regarding potential dangers possessed by employees, collate the data, and implement policies which will prevent reasonably foreseeable risks from occurring. If the company is derelict in this duty and a crime has resulted, it must share in the responsibility of the resulting harm. “The shift of judicial attention from individual to corporate fault would have several side benefits. It would avoid the evidentiary problem of tracing the strands of responsibility to particular individuals, with its inherent dangers of scapegoating...[S]hifting the onus of responsibility to the company would also avoid the conundrum of aggregating a number of negligent acts into a sum which is claimed to warrant a finding of recklessness or gross negligence. If there is fault to be attributed to the company, it is to be found in the way that the company organises or operates its business affairs. It is often argued that a company cannot act

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<sup>131</sup> Fisse, n. 8 at p. 410.

<sup>132</sup> Gobert, n. 2 at p. 408 Op Cit.

except through real persons-directors, officers and employees. This may be so, but it need not control the law's approach to corporate criminality.'<sup>133</sup>

The trend towards corporate blameworthiness which Wells argues is evident, is primarily a response to the inefficiency and unsatisfactory nature of the *Natrass* philosophy and vicarious liability.<sup>134</sup> Whilst recognising a subtle drift from the *Natrass* philosophy towards a newer model of corporate fault Wells offers a cautionary note. She contends that there has been,

'a subtle transformation of traditional judicial attitudes based on the notion of director and officer control to a modern understanding of the power of corporations to produce economic and personal harm and the consequent importance of seeking to control them through effective mechanisms of criminal law. This appears to be more than an accident of statutory construction, given the second observable trend towards a new version of corporate blameworthiness. It would, however, be a mistake to assume that courts address themselves to general principles or theories of responsibility. Most corporate cases are brought under specialised legislation and determined accordingly. Courts are reflecting the general mood of reduced tolerance of corporate risk-taking in their decision-making.'<sup>135</sup>

Corporate fault is a conceptually different approach to corporate criminality. The company is treated as a collective entity itself without reference to individual liability. 'The company is treated as a distinct organic entity whose "mind" is embodied in the policies it has adopted. Corporate policy is often different from the sum of the inputs of those who helped to formulate the policy, and typically is the product of either synthesis of views or a compromise among competing positions. Policy may also reflect the company's corporate ethos. This ethos which is often unwritten, may have been forged by founders of the company who are no longer actively involved in its day to day affairs. When company policy or corporate ethos leads to the commission of a crime, the company should be liable in its own right and not derivatively.'<sup>136</sup> The attraction of such an approach is that

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<sup>133</sup> Gobert, n. 2 at pp. 409-410.

<sup>134</sup> C. Wells, 'The Corporate Manslaughter Proposals: Pragmatism, Paradox And Peninsularity' 1996 Criminal L. R. 545 at p. 574.

<sup>135</sup> Wells, n. 68 at p. 1327.

<sup>136</sup> Gobert, 'Corporate Criminality: New Crimes For The Times' 1994 Criminal L. R. 722-734 at pp. 723-4.



it takes one away from the *actus reus/mens rea* polemic. Individualism is supplanted by what Gobert calls a more expansive view of causation. It also has appeal in the fact that it moves away from the application of conventional criminal liability to the corporate form.<sup>137</sup> Gobert sees distinct advantages in this in that it will take away the problems associated with the 'courts attempts to squeeze corporate square pegs into the round holes of criminal law doctrines which were devised with individuals in mind.'<sup>138</sup>

Gobert also believes that corporate criminality requires systematic review by Parliament. His proposed model of corporate fault has underlying it a belief that 'a company should be criminally liable where a crime is authorised, permitted or tolerated as a matter of company policy or *de facto* practice.'<sup>139</sup> According to Gobert's corporate fault model, the 'focus would be on the creation of risks likely to lead to the occurrence of serious harm. If the harm in fact materialised, the company's liability would be for the failure to prevent the harm rather than for the substantive crime itself.' The company has an obligation to prevent crime under this model. In practice this means their development of policies and their implementation and the establishment of corporate ethos. This approach moves away from focus of *mens rea*. As Gobert argues '*Mens rea* is one way, but not the only way, of getting at the issue of blameworthiness.'<sup>140</sup> The defence for a company facing criminal liability under a corporate fault model would be that of due diligence. Gobert argues that the burden of proving due diligence should fall upon the corporation. In his scheme the overall burden of proof in corporate crime cases should be that of balance of probabilities.<sup>141</sup> This, at best, is controversial. The adaptation of a civil standard of proof into criminal proceeding must be debatable.<sup>142</sup> In satisfying the test of due diligence Gobert suggests that the courts should adopt a test which clearly has its origins in health and safety law with a balance being struck between the risk created against the social utility of the

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<sup>137</sup> Gobert, n. 136 at p. 724.

<sup>138</sup> Gobert, n. 136 at p. 724.

<sup>139</sup> Gobert, n. 136 at p. 728.

<sup>140</sup> Gobert, n. 136 at p. 729.

<sup>141</sup> Gobert, n. 136 at p. 730.

<sup>142</sup> See Khanna n. 5; and also Chapter 4 of this thesis

activity weighed against the cost and practicability of eliminating the risk. Gobert is unclear whether due diligence should be delineated by Parliament or by the judiciary. What he is clear about is that due diligence should be evidenced not just by senior management but rather by the organizational structure.<sup>143</sup>

Whilst recognising the importance of the relationship between individual liability and corporate liability, what is required is a distinction of both and for autonomous corporate culpability disassociated from culpability transmitted through corporate officials. Those who argue strongly for corporate fault draw support from the work of French and Dan Cohen. Their approach is that corporations are capable of forming their own intention and mental state. It presupposes that 'companies of sufficient organizational complexity develop over time an intentionality and reasons for acting which exist in a realm separate from the individual intentions and motivations of the individuals currently connected with the company.'<sup>144</sup> Policies contain basic belief and goal statements<sup>145</sup> and as such, intent can be fixed to policies rules and practices.<sup>146</sup> A problem with corporate fault is that organisations inhere as 'much in its informal practices as in its official decisions.'<sup>147</sup> Moreover, one of the evident problems in deducing corporate attitudes and culpability from policies is that 'companies may by the setting of their institutional priorities, create a climate which discourages obedience to known rules'<sup>148</sup> Fisse suggests a pragmatic approach to the whole question of corporate criminal liability arguing that,

'the adoption of a multi-aim, multi-fault approach to corporate responsibility..essentially an approach in which relevant fault requirements are defined in fairly precise accordance with policy aims, the

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<sup>143</sup> Gobert, n. 136 at p. 732.

<sup>144</sup> Sullivan, n. 127 at p. 284. French suggests the following method of determining whether a corporation is sufficiently organised

1- internal organisation and/or decision procedures by which courses of concerted action can be chosen

2-enforced standards of conduct different and more stringent than those applying in the wider community

3- members filling differing defined roles by virtue of which they exercise power over other members

<sup>145</sup> P. French, *Collective And Corporate Responsibility*, (1979) at p. 58 op cit.

<sup>146</sup> Colvin, n. 91 at p. 33.

<sup>147</sup> Colvin, n. 91 at p. 36

<sup>148</sup> Field and Jorg, n. 66 at p. 166.

emphasis being upon the functions of corporate responsibility, not anthropomorphic attribution or rule of slipshod attachment to guiding purposes....It is futile to expect justice to be done to such disparate aims by the enactment of an offence to which only one species of fault is applicable.'<sup>149</sup>

Colvin argues that mere evidence of criminogenic corporate culture should provide a sufficient fault element for those offences that can ordinarily be committed recklessly.<sup>150</sup> Such a proposition requires clarification of how one will establish criminogenic culture. If it involves a pre-trial view of past convictions it may wreak too much of the sins of the past being visited upon the corporation. There will require to be a clear understanding that in looking to past indiscretions we are merely seeking evidence of practices which exhibit corporate philosophy. We view the essence of individual criminal law as one where the accused faces trial with a 'clean slate.' Only after a finding of guilt are past misdemeanours revealed. To approach the corporation in an entirely different way may be far too much to swallow. Fisse and Braithwaite claim that the notion of corporate blameworthiness has been accepted and now the real challenge is to find a workable concept of corporate fault.<sup>151</sup> With their support of reactive corporate fault (see chapter 4) they very much endorse *post hoc* assessment. In a British context, instinctively one feels that assessment of corporate fault will require to be a contemporary assessment of corporations' policies practices procedures, ethos or culture but that corporations should be afforded the protection from revisitation of past offences as

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<sup>149</sup> Fisse, 'Responsibility, Prevention And Corporate Crime' 1973 5 New Zealand Law Review pp. 250-279 at p. 265.

<sup>150</sup> Colvin, n. 91 at p. 38; A suggestion by Colvin for a model of corporate fault liability based on recklessness is

'1 If recklessness is a required fault element of an offense, that fault element may be established by proof that the culture of a corporation caused or encouraged non-compliance with the relevant provision

2.(a) If purpose is a required fault element of an offense, that fault element may be established by proof that it was the policy of a corporation not to comply with the relevant provision

(b) A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation

3.(a) If knowledge is a required fault element of an offense, that fault element may be established by proof that the relevant knowledge was possessed by a corporation

(b) Knowledge may be attributed to a corporation where it was possessed within the corporation and the culture of the corporation caused or encouraged knowing non-compliance with the relevant provision' Colvin, n. 91 at p. 41

<sup>151</sup> Fisse and Braithwaite, *Corporations, Crime And Accountability* (1993), at p. 47

a basis of identifying corporate fault. Bucy offers a variation on French's idea arguing that corporate fault might be founded upon the basis of corporate ethos which she suggests might be deduced from the amount of compliance education the company gives its employees, its attitudes to compensation and indemnification and its practices.<sup>152</sup> Systems analysis also offers interesting possibilities. In *Seaboard Marine Offshore* there was a clear suggestion that the company might be liable for not establishing a safe operating system<sup>153</sup> British courts are reasonably well versed in dealing with offences under section 2 of the Health and Safety at Work Act 1974 where employers can be found guilty of not operating a safe system.

According to Clarkson, there are two main theories of responsibility- the capacity theory and the character theory. Capacity theory adopts a simplistic formula that dictates that someone is responsible if they are capable of reason and capable of exercising control over their actions and choosing whether to comply with the law. In the realms of corporate capacity such an approach has intellectual appeal primarily because it introduces corporate criminal liability for negligence. As Clarkson explains,

'in making choices we expect actors to take reasonable steps to avoid causing harm or exposing others to risk. The character theory dictates that we hold persons liable for those actions which express their character. Intentionality, recklessness and negligence display character traits of indifference or malevolence.'

Even to the uninitiated it is obvious that both theories might be applicable to corporate organisations irrespective of the culpability of the human actors who operate within the structure of the organisation. Clarkson's view is that companies should be subject to the same normal principles of criminal liability.<sup>154</sup> Whilst the issue of causation should not prove problematic for corporate crime, the real problem may well be in the location of the guilty mind or the requisite *mens rea*.

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<sup>152</sup> Bucy 'Corporate Ethos: A Standard For Imposing Corporate Criminal Liability' 75 Minn L R 1095 (1991); see also Sigler and Murphy, *Interactive Corporate Compliance; An Alternative To Regulatory Compulsion* (1988)

<sup>153</sup> See Wells, 'Corporate Manslaughter: A Cultural And Legal Form' <http://camlaw.rutgers.edu/crimlawforum/wells.html>. at p. 13.

<sup>154</sup> Clarkson., n. 101 at p. 570.

Policies and ethos may be significant in this regard. As far as crimes requiring *mens rea* Clarkson adopts the views of others that corporate policies and procedures would evidence the criminal mind. The Council of Europe has proposed that when the actions of a company or its employees lead to a prohibited harm, the company would *prima facie* be liable and it would be incumbent on the company to dislodge an evidential burden to prove otherwise and that it operated a safe system. Ashworth alluding to the enormous power and privilege of the corporate form argues that there is no injustice in requiring corporations to adopt what is a higher standard or burden of criminal liability especially if they are given advance warning of implementation.

According to Wells, *Seaboard* and *Tesco v London Borough of Brent* *supra* demonstrate a realism in the courts<sup>155</sup> that society appears to need the concept of organisational blame.<sup>156</sup> Wells suggests that some of the recent cases display judicial perception as to the irrelevance of the identification theory to corporate risk taking.<sup>157</sup> She argues that,

‘legal ideas in this sphere have matured from reliance on the agency identification dyad (represented by the vicarious and direct routes to liability) to the faint tremors of an emerging recognition that company policies and systems might form the basis for the ascription of criminal responsibility.’<sup>158</sup>

Colvin similarly adopts the view that criminal law should be made to focus directly on the issue of organisational culpability ‘if the shackles of derivative liability were removed, corporations would face substantial exposure to liability for their omissions..it might be appropriate to increase this exposure through the imposition of a general duty upon corporations to guard against their operations causing harm and their structures and resources being used to cause harm.’<sup>159</sup> Interestingly, the new proposal for an offence of corporate killing (see chap 5) seeks to develop the concept of organisational blameworthiness. Whilst this is a

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<sup>155</sup> Wells, n. 153 at p. 13.

<sup>156</sup> L. Dunford and A. Ridley, ‘Corporate Manslaughter- Time For Reform’ 1996 Paper at p. 5.

<sup>157</sup> Wells, n. 153 at p. 5.

<sup>158</sup> Wells, n. 153 at p. 6.

<sup>159</sup> Colvin, n. 91 at p. 25.



welcome development, it still requires definition and elucidation. One danger may be the desire to equate this simply with managerial failings. In the process we may simply be reinventing the *Natrass* philosophy by the back door. The organisation as a collectivity is more than its managers. Corporate fault must look to collective failing rather than the failings on one section of the organisation.

## 2.5 Conclusion

It does appear that 'There is clearly dissatisfaction with the traditional derivative models of corporate liability and interest in exploring alternatives. As yet, the direction forward remains unsettled.'<sup>160</sup> Clarkson in common with other writers suggests that a new approach might be better than working through the various current models of attribution. The normal route of criminal attribution through moral fault is fraught with difficulty but surmountable for all that. The concepts of power and acceptance form the basis of a model of liability in the United Kingdom. Power and acceptance carry with them hierarchical connotations. As we have seen in several recent English cases reference to the hierarchy provides nonsensical results. An approach based on responsibility is more concerned with prescribing courses of action or modes of behaviour rather than locating blame.<sup>161</sup> For that reason, whilst it may form part of the strategy to combat corporate crime, it offers no solution to activating certain common law criminal offences which represent necessary controls on the corporate form. For all the criticisms of vicarious liability and the identification doctrine they have endured because we have not as yet formulated an intellectually satisfying basis on which to attach liability. Corporate fault seemingly represents the solution but it too requires some refinement. Foerschler summarises the nature of the dilemma by saying 'the atomistic view, while recognizing that a corporation is an aggregate of individuals, underestimates the added "complexity and inscrutability" of the corporate structure itself. At the same time, a strict holistic approach exaggerates the unity of the corporation.'<sup>162</sup> Identification warts and all continues to hold primacy in the United Kingdom courts but our attachment to identification as a doctrine should

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<sup>160</sup> Colvin, n. 91 at p. 3.

<sup>161</sup> Surber, n. 1 at p. 81.

<sup>162</sup> Foerschler, n. 4 at p. 1299.

not be complete. The recent attempts to develop a more holistic approach to liability reflecting corporate culpability are to be welcomed as a more satisfactory basis on which to ascribe liability. Eser has claimed that 'it is ..a permanent obligation of criminal jurisprudence to refine the principles of criminal liability.'<sup>163</sup> In reconstructing corporate criminal liability the task is slightly more challenging and that is to devise an altogether more satisfactory basis for the ascription of liability to the corporation.

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<sup>163</sup> Eser, *'The Principle Of Harm In The Concept Of Crime: A Comparative Analysis Of The Criminally Protected'* 1965-6 Legal Interests 4 Duquesne L Rev 345 at p. 365; quoted in Seney, *'A Pond As Deep As Hell- Harm, Danger And Dangerousness In Our Criminal Law'* 1971 17 Wayne L. R. at p. 1117.

**CHAPTER 3**

**CORPORATE CRIMINAL LIABILITY AND THE DICHOTOMY OF  
INDIVIDUALISM OR CORPORATISM**

### **3.0 Introduction**

Despite the undoubted contribution of entrepreneurs in the creation of wealth<sup>1</sup>, it is also true as CS Lewis once observed that crimes are often 'conceived and ordered (moved, seconded, carried and minuted) in clean, carpeted, warmed and well-lighted offices, by quiet men with white collars and cut fingernails, and smooth shaven cheeks who do not need to raise their voices.'<sup>2</sup> The recognition of human agency in the commission of corporate crime exacerbates one of the major dilemmas of corporate criminal liability. Is the crime committed that of the individuals or is it the crime of the corporation in whose name, or under whose auspices they act ? The dichotomy of individualism and enterprise liability is a classical polemic of corporate crime and one which has been resolved in different ways in different jurisdictions around the world. In the Anglo-American systems corporate guilt does not eliminate the personal guilt of the natural person to whom the offense may be attributed whereas in the European civil law systems the individual is primarily responsible.<sup>3</sup> Britain universally adopts a common law position albeit that the jurisprudence in Scotland does little more than concede the existence of corporate criminal liability for common law crimes as well as statutory crimes.<sup>4</sup> Geis and Dimento have suggested in prosaic terminology that,

'Only dim echoes linger today in the jurisprudence of the United States, England and Canada of the once intense debate about whether it is proper-ethically, juridically, and in terms of effectiveness- to punish a corporation criminally rather than, or in addition to, punishing individuals within it.'<sup>5</sup>

Despite this claim, the issue continues to be debated with some vibrancy. Many of those who adopt a collectivist perspective do so on the basis that it is the

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<sup>1</sup> R. A. Gordon, *Business Leadership In The Large Corporation*, (1945) at p. 3.

<sup>2</sup> Quoted in G. Slapper, 'Where The Buck Stops' 1992 142 New L. J. 1037-38 at p. 1038.

<sup>3</sup> L. H. Leigh, 'The Criminal Liability Of Corporations And Other Groups: A Comparative View' 1982 80 Michigan L. R. 1508-29 at p.1518; Muir, 'Tesco Supermarkets, Corporate Liability And Fault' 1973 5 New Zealand Universities L. R. 357-72 at p. 359; Stessons, 'Corporate Criminal Liability: A Comparative Perspective' 1994 International and Comparative Law Quarterly 493-520

<sup>4</sup> See Leigh n. 3 at p. 1524; see Chapter 6 of this thesis

<sup>5</sup> F. Pearce and L. Snider, *Corporate Crime: Contemporary Debates*, (1995), at p. 72.

organisation which creates the circumstances which result in corporate crime. Not only is the crime perpetrated by the collective entity but, even the circumstances which result in the individual human agent bringing about the corporate crime are wrought by the influence that the corporation has over his or her activities. Moreover, crime may be committed for organisational reasons or gain irrespective of whether individuals within the organisation benefit.

Many commentators believe that most businesses fall foul of the law for economic reasons.<sup>6</sup> Certainly, manager perception is that violation was more likely to occur in such situations.<sup>7</sup> The success of the organisational goal attainment imperative predicts that an organisation will engage in criminal activity to attain those goals.<sup>8</sup> As such we should have little surprise at the level of corporate crime in society. However, criminal violation cannot be solely attributed to economic pressure.<sup>9</sup> Corporate loyalty, obedience and the desire for advancement are all cited as reasons for unethical and illegal behaviour by individuals within the corporation.<sup>10</sup> Notwithstanding that there may often be individual gain, Harris claims that, 'the question is one of institutional structure, not individual morals tactics.'<sup>11</sup> The significance of the corporate influence and the adoption of corporate goals is also emphasised by other writers. For example, it is claimed that,

'The immensity, the diffusion of responsibility, and the hierarchical structure of large corporations all foster conditions conducive to organizational deviance. In addition, the nature of corporate goals may promote unethical and illegal behaviour. Using this orientation, organizational theory can provide valuable insights into how the unique

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<sup>6</sup> Lane in Geis and Meir (Eds.), *White Collar Crime*, (1977), at p. 103; cf. Clinard, *Corporate Ethics And Crime- The Role Of Middle-Management* (1983) at p. 144 whose study found no such support for this argument; Wilson and Braithwaite, *Two Faces Of Deviance: Crimes Of The Powerless And The Powerful* (1978) at p. 207.

<sup>7</sup> Clinard, n. 6 at p. 145.

<sup>8</sup> Wilson and Braithwaite, n. 6 at p. 200.

<sup>9</sup> Clinard and Yeager, *Corporate Crime* (1980) at p. 299. Ambiguity and complexity of law are also advanced as reasons why businessmen violate the law. However, Lane disputes this saying, 'although ambiguous provisions of the law and factually contested situations often lead to 'violation'...ignorance of the law and incapacity to respond seem, in most cases, to be relatively unimportant causes of violation.' Lane, n. 6 at p. 108

<sup>10</sup> Clinard and Yeager, n. 9 at p. 275.

<sup>11</sup> R. Nader and M. Green (Eds.), *Corporate Power In America*, (1973), at p. 35.

nature of corporations as large-scale organisations relates to the unethical and illegal behaviour that does occur.<sup>12</sup>

Lane suggests, that in the larger corporations there may be a tendency toward impersonalisation through frequent group consultation and socialisation.<sup>13</sup> Moreover, Kemper claims, in his concept of parallel deviance, that the aetiology of individual corporate deviance is to be found in the justification which employees derive from the greater and more extensive deviance perpetrated by their superiors.<sup>14</sup> Inevitably, managers caught in the dilemma of societal good and corporate good must decide to whom they owe the greater duty.<sup>15</sup> So we confront a major problem- should we punish those who gain from the wrongdoing or the actual agents of that wrongdoing? Do we pursue the corporation because its ethos, goals and criminogenic pressures compelled the human actor to commit the crime on its behalf or for its benefit? Whatever the motivation, or rationale, for the criminal activity, it is trite to assert that 'society has a right to demand a certain standard of performance and a level of accountability from corporate executives and to require that executives be held responsible for the actions of their subordinates and the corporations they manage.'<sup>16</sup>

Whilst there is strong support for enterprise liability among common law jurists, there is also voluminous jurisprudential literature supporting philosophical individualism. The essence of that individualism is that,

'Society is composed of individuals. It has no reality independent of its members. What appear to be the accomplishments of the whole are in fact the sum of works of individuals. Groups exist; but they reflect a convergence of separate interests. And the group is not a source of value in its own right. For the good is relative to the wants of distinct persons.

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<sup>12</sup> Clinard, n. 6 at p. 17; see also D. Vaughan, *Controlling Unlawful Organisational Behaviour: Social Structure And Corporate Misconduct*, (1983) at p. 55.

<sup>13</sup> Lane in Geis and Meir (Eds.), n. 6 at p. 111.

<sup>14</sup> Kemper 'Representative Roles And The Legitimation Of Deviance' 1966 13 Soc. Problems 288-298.

<sup>15</sup> Koprowicz, 'Corporate Criminal Liability For Workplace Hazards: A Viable Option For Enforcing Workplace Safety' 1986 52 Brooklyn L. R. 183-227 at p. 184; M. Clinard and P. Yeager, n. 9 at p. 273

<sup>16</sup> S. Sethi, 'Liability Without Fault: The Corporate Executive As An Unwitting Criminal' 1978 4 Employee Relations L. R. 185 at p. 212.



The immediate measure of conduct lies within the individual rather than in the group to which it belongs.<sup>17</sup>

Fisse and Braithwaite contend that,

‘Four prime assumptions underlie Individualism, old and new. The first is a philosophical position, namely methodological individualism. Methodological individualism holds that only individuals act, that only individuals are responsible, and that corporate action or corporate responsibility is no more than the sum of its individual parts. Secondly, individualism supposes that the theory of deterrent punishment implies the need for, or the sufficiency of, individual liability. Thirdly, it is assumed that retribution postulates the punishment of individual persons but not corporate entities. Fourth the supposition is that individuals are best safeguarded against injustice by focusing on individual criminal responsibility and the substantive or procedural constraints that govern the imposition of criminal responsibility.’<sup>18</sup>

Underlying support for individualism is the belief that the ‘accumulation of corporate wrongs is..a manifestation of individual sin.’<sup>19</sup> Such support is based on criminological assertion that only individuals can be moral agents and, on tacit support for the notion that a corporation will be looked upon as a legal entity until it is used as a device to defeat public convenience or commit crime in which case it should be regarded as an association of persons.<sup>20</sup> Individualism accordingly dictates that morality is by definition a peculiarly personal experience.<sup>21</sup> According to Fisse, the real strategy of individualism is to abolish corporate criminality and rely entirely on individual liability.<sup>22</sup> Bush draws out the antagonism that individualists have towards corporatists explaining that corporatism entails,

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<sup>17</sup> Murphy, *Liberalism, And Political Society* 26 American Journal of Jurisprudence 125 at p. 153 (1981) quoted in Bush, ‘*Between Two Worlds: The Shift From Individual To Group Responsibility In The Law Of Causation*’ 1986 33 University of California Law Review 1473 -1569 at p. 1521; see also HD Lewis in May and Hoffman (Eds.), *Collective Responsibility* at p. 17

<sup>18</sup> Fisse and Braithwaite, *Corporations, Crime And Accountability* (1993) at p 18; Fisse ‘*The Allocation Of Responsibility For Corporate Crime: Individualism, Collectivism and Accountability*’ 1988 Vol. 11 Sydney Law Review 468-513 at p. 475.

<sup>19</sup> Judge Miles W Lord in Hills, *Corporate Violence: Injury And Death For Profit* (1987) at p. 41.

<sup>20</sup> Judge Sanborn in *US v Milwaukee Refrigerator Transit Co.* 142 F 247, at 255 quoted in Oleck, ‘*Remedies For Abuses Of Corporate Status*’ 1973 9 Wake Forest L. R. 463-502 at p. 484.

<sup>21</sup> Rosen in Pennock and Chapman, *Criminal Justice*, (1985) at pp. 69-70.

<sup>22</sup> Fisse n. 18 at p. 473.; Bush, n. 17 at p. 1527

'Ignoring the unique identity and value of the individual..[submerging] the individual in a group or class of 'similar' parties and penalises or compensates him not as an individual but as a member of a class.'<sup>23</sup>

Bush seeks to develop the communitarian theory which views the self as joined and attached to others and, views the community as constitutive of an expanded self,<sup>24</sup> as a middle ground which she believes 'shows that the dichotomy world of liberalism and social welfarism, with its Hobson's choice between arid individualism and oppressive collectivism does not exhaust the field of possibilities.'<sup>25</sup> The antagonism that individualists have to collective liability does not appear to be reciprocated by collectivists towards individual liability. Fisse a staunch supporter of enterprise liability contends that,

'Individual accountability has long been regarded as indispensable to social control, at least in Western societies but today is more the exception than the rule in the context of offences committed on behalf of larger scale organisations. Given the gravity with which corporate crime is increasingly perceived, this is a remarkable state of affairs and one which awaits responsive solutions.'<sup>26</sup>

Fisse and Braithwaite do, however, argue that the simplicity of a reductionist perspective is fallacious. Corporations are not just the sum of the individuals which comprise it. Nor are individuals just part of the whole. Corporations as entities often appear more systemic than organic.<sup>27</sup> McAdams and Tower see the move from individualism to collectivism as one premised on the belief that,

'The just allocation of fault is an essential ingredient in building a credible, healthy society. The growth of giant corporations with their multiple layers of bureaucratic responsibility has significantly complicated the critical process of fixing blame. The faceless quality of contemporary bureaucracies has had an important, though largely unexplored, impact on law enforcement.'<sup>28</sup>

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<sup>23</sup> Bush, n. 17 at p. 1524-5.

<sup>24</sup> Bush, n. 17 at p. 1536.

<sup>25</sup> Bush, n. 17 at p. 1563.

<sup>26</sup> Fisse, n. 18 at p. 473.

<sup>27</sup> Fisse and Braithwaite, n. 18 at pp. 19-22

<sup>28</sup> Quoted in Fisse and Braithwaite, '*Accountability And The Control Of Corporate Crime: Making The Buck Stop*', in M. Findlay and Hogg (Eds.), *Understanding Crime And Criminal Justice*, (1988), at p 95.

Individualism and collectivism often appear contradictory and irreconcilable philosophies. Despite this most of the Anglo-American jurisdictions have sought to strike a balance between the two strands of theory incorporating both collective guilt and individual guilt into their systems. They have justified this approach on the basis of plurality and efficacy. Surveying the literature in those jurisdictions reveals that the confrontation between these two underpinning philosophies still resonates. With the establishment of corporate criminal liability in the Anglo-American jurisdictions one might presuppose that the debate was sterile and that any dispute had been resolved in favour of enterprise liability. Yet all the signs are that individualism may be re-emerging.

### 3.1 Individualism

In relatively recent times, there has been an intensification for the call to return to the early notion of purely individualistic liability.<sup>29</sup> Donaldson, for example, argues for restoration of individual accountability, enhancement of professional accountability and improvement of bureaucratic decision making.<sup>30</sup> McAdams and Tower likewise endorse the 'zest for penetrating the bureaucratic fog to impose personal accountability.'<sup>31</sup> There is evidence that support for an individualistic drive is not confined to academics. In all common law jurisdictions, there are many new offences applicable to individual corporate wrongdoers. This trend is but one aspect of the demand for greater accountability which has been explained in the following terms,

'At the heart of the movement towards holding managers personally responsible for corporate law violations lies the struggle of individuals and societies to come to grips with the reality of the corporation and to subject it to effective societal controls. It reflects the failure of more traditional means of correcting corporate abuses, both conventional and unconventional.'<sup>32</sup>

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<sup>29</sup> Fisse, n. 18 at p. 474; Glasbeek in Pearce and Snider (Eds.), n. 5; J. L. J. Edwards, *Mens Rea In Statutory Offenses*, (1955) at p. 243

<sup>30</sup> Donaldson, *Corporations And Morality* (1982) at pp. 109-28.

<sup>31</sup> T. McAdams and C. B. Tower, 'Personal Accountability In The Corporate Sector' 1978 16 American Business L. J. 67-82 at p. 67; Sethi, n. 16 at p. 186

<sup>32</sup> Sethi, n. 16 at p. 199.

The individualist drive is premised on the erroneous conception that only individuals can be deterred.<sup>33</sup> Fisse and Braithwaite suggest that from their study that there has been an absence of prosecution of individuals but that this should not obscure the fact that amongst government agencies there has been a policy to proceed against individuals.<sup>34</sup> Director's liability clauses prevalent in many British statutes represents a determined attempt to target individuals rather than the corporation. Prosecution of the corporation alone is usually a direct result of the difficulties in identifying the individual perpetrator.<sup>35</sup> Where the individuals can be readily identified, there is a supposition that prosecutors will elect to pursue those persons. The problem of identification is often proportional to the size and complexity of the corporation itself.<sup>36</sup> Any unwillingness to redouble efforts to 'ferret out' individual perpetrators is often viewed as a serious shortcoming in most legal systems.<sup>37</sup> However, some believe it disingenuous to impose corporate liability on the basis of difficulty in attaching individual liability and that there may be another more appropriate route. Fisse and French suggest that 'If it is unworkable to make corporate criminal liability contingent on the impossibility, impracticability, or injustice of recourse to individual criminal liability, why not reform individual criminal liability so as substantially to lower the hurdles which now hinder enforcement against corporate officers and executives?'<sup>38</sup> Such an approach doubtless takes pragmatism too far. Meuller also rejects the argument that corporate liability should be imposed where individual liability is difficult to prove. His view is that,

'It is a poor legal system indeed which is unable to differentiate between the law breaker and the innocent victim of circumstances so that it must punish both alike. Where profit to the corporation as the result of the unauthorised act of an operative is concerned, principles of equity can easily be applied to provide for restitution of the ill-gotten gain to the

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<sup>33</sup> Fisse and Braithwaite, n. 18 at p 31

<sup>34</sup> See Fisse and Braithwaite in Findlay and Hogg (Eds.) n. 28 at pp 96-100

<sup>35</sup> Note 'Structural Crime And Institutional Rehabilitation: A New Approach To Corporate Sentencing' 1979 vol. 89 Yale Law Journal 353-375, at p. 357

<sup>36</sup> Lederman, 'Criminal Law, Perpetrator And Corporation: Rethinking A Complex Triangle' 1985 76 Journal of Criminal Law and Criminology 285-340, at p. 317.

<sup>37</sup> Koprowicz argues that 'on the whole, the imposition of penal sanctions on recalcitrant corporate officials is a good way to help ensure safety in the workplace, but that it is necessary to demonstrate clearly the causation between the act or omission and the harm before such sanctions are imposed.' n. 15 at p. 188.

<sup>38</sup> Fisse and French (Eds.), *Corrigible Corporations And Unruly Law* (1985) at p. 201.

parties actually entitled thereto, or for forfeiture in lieu thereof. But when we talk about the imposition of punishment, then rather than punish the corporation in such cases, why not punish the operative for his own independent act.<sup>39</sup>

Individual liability is ultimately important in respect for the incentive that it provides to individual corporate agents not to commit violations<sup>40</sup> There are several reasons why individual liability of officers may have advantages over corporate criminal liability. According to Finch,

'The principal limitations to enterprise liability are: asset insufficiency- when firms lack the assets that would be required to make good the damage caused by wrongdoing; sanction insufficiency- when the legal system cannot impose, or judges are unwilling to impose, costs on the firm that are sufficiently high to deter wrongdoing...; and enforcement insufficiency- which occurs when a legal system is unable to detect or prosecute a significant proportion of offences..Personal liability may provide high levels of deterrence and may overcome some of the problems that are encountered in prosecuting corporations. Potential personal liability may, moreover, encourage directors to provide information to those investigating company failings In the hope of offsetting their own liability.'<sup>41</sup>

Another clear rationale for punishing the individual corporate agent of course is that they may engage in the corporate wrongdoing because they perceive it to be in their own interest rather than that of the corporation. Finch also claims that 'without the stimulus of personal liability, directors will not act independently from management and will not act as detached scrutineers of their colleagues.'<sup>42</sup> What is required is the creation of what Sethi calls a 'climate of moral revulsion.'<sup>43</sup> Finch argues that prosecution of personal liability is cheaper and has the added advantage of providing a lever for information on other corporate wrongdoing.<sup>44</sup> Personal liability of corporate agents may also be beneficial where the company is insolvent.<sup>45</sup> Levitske however, notes the problem of transience of workers in

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<sup>39</sup> Meuller, 'Mens Rea And The Corporation' 1957 19 University of Pittsburgh L. R. 21-48 at p. 45.

<sup>40</sup> 'Developments In The Law, Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions', 1979 Harvard Law Review 1299- 1375 at p. 1245.

<sup>41</sup> Finch 'Personal Accountability And Corporate Control: The Role Of Directors And Officers Liability Insurance' 1994 57 Modern L. R. 880-915 at p. 881.

<sup>42</sup> Finch, n. 41. at p 882.

<sup>43</sup> Sethi, op cit. n. 16 at p. 203.

<sup>44</sup> Finch, n. 41 at p. 883.

<sup>45</sup> Finch, n. 41 at p 883



tackling corporate crime on an individualistic basis.<sup>46</sup> Finch also recognises certain pitfalls of personal liability claiming that,

'Laws based on individual liability may, however, be difficult to enforce because of organisational secrecy, numbers of suspects and evidential problems associated with attempts to isolate culprits and prove cases. In many instances of corporate misconduct, collective action will constitute the root problem and it may be right to seek retribution against the enterprise itself.'<sup>47</sup>

Ashworth supports the notion that 'in appropriate cases' individuals within the corporation should bear responsibility and consequent liability for criminal wrongdoing.<sup>48</sup> Indeed, for some commentators the very fact that one is a director is sufficient to attract liability where wrongdoing occurs. Business leadership is the function of organising and directing business enterprises, and of making the decisions which determine the course of the firms activities.<sup>49</sup> In so far as business leadership means decision making then it encompasses initiation and approval and one of the key factors which distinguishes the executive from the operative is the ability to determine objectives for the corporation as a whole.<sup>50</sup> Accordingly, there are those who believe that 'The directors of a company ought to be individually accountable for every case of misconduct of which the company receives the benefit, for the very preventable deficiency or cause that regularly goes on in the course of business.'<sup>51</sup> Taking this idea up, Spiegelhoff suggests the imposition of two standards of liability for directors; one based on negligent supervision and the other on reckless supervision.<sup>52</sup> In respect of the negligent supervision, an accused director would be criminally liable whenever he knew or should have known of a substantial risk that an illegal act was occurring or would occur within his realm of authority. In respect of reckless liability, a defendant would incur liability if he

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<sup>46</sup> J. Levitske, 'Will The US Sentencing Commission's New Proposed Guidelines For Crimes By Organisations Provide An Effective Deterrent For Crimes Attributed To Corporations?' 1991 29 Duquesne L. R. 782-802 at p. 797.

<sup>47</sup> Finch n. 41 at p. 884.

<sup>48</sup> A. Ashworth, *Principles Of Criminal Law*, (2nd Ed., 1995), at p. 115; see also Braithwaite and Fisse, 'Varieties Of Responsibility And Organisational Crime' 1985 73 Law and Policy 315

<sup>49</sup> Gordon, n. 1 at p. 5 op cit.

<sup>50</sup> Gordon, n. 1 at p. 50.

<sup>51</sup> E. A. Ross, *Sin and Society*, at p. 126.

<sup>52</sup> Spiegelhoff, 'Limits On Individual Accountability For Corporate Crimes' 1984 67 Marquette L. R. 604-640 at pp. 622-3.

'knew of facts creating a substantial likelihood of illegal conduct and did not enquire further, or if a corporate manager knew of a hazardous condition and failed to take remedial action.' If the intent requirements of "true" crimes are loosened to accommodate the societal desire to punish responsible corporate officers, the moral stigma attached to such crimes may also be relaxed.<sup>53</sup> Spiegelhoff is nonetheless critical of the achievement of individual liability. He argues that it 'has not generally been an effective means of deterring illegal corporate conduct.' In support of his thesis, he cites a lack of public moral indignation towards profit motivated conduct in a capitalist society, and the imposition of light penalties on individual offenders.<sup>54</sup> These failings are all the more acute because the real 'need today is to stop individuals who run corporations from inflicting harm.'<sup>55</sup> It is not only those who run corporations who are in the individualist's sights. Hamilton, for example, argues that every individual regardless of their place in the corporate structure should be prosecuted where his or her conduct is immoral or wrongful.<sup>56</sup>

The problem of identification of the individual wrongdoer has been highlighted previously. An obvious way round identifying appropriate individuals would be for companies to prepare and file organisational accountability plans. There are however logistical difficulties with this approach which will ensure, that as an idea, it is resisted by corporations.<sup>57</sup> As an alternative, Weinfeld suggests the following general formulation for individual responsibility which might assist the process of identification 'A person responsible for supervising particular activities on behalf of an organisation who, in failing to supervise adequately those activities, knowingly permits or contributes to the creation of a substantial and unjustifiable risk of serious physical injury or death to another and such injury or death occurs is guilty [of a class E felony.] It is an affirmative defence to this section that the person took steps to prevent the continuing existence of the risk before death or

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<sup>53</sup> Spiegelhoff, n. 52 at p. 624.

<sup>54</sup> Spiegelhoff, n. 52 at p. 625.

<sup>55</sup> S. L. Hills, n. 19 at p. 39. see also Ralph Nader, *New York Times* 9/6/85.

<sup>56</sup> R. Hamilton, 'Corporate Criminal Liability In Texas' 1968 47 Texas L. R. 62-85 at p. 73.

<sup>57</sup> Fisse and Braithwaite, *The Impact Of Publicity* (1983) at p. 262.

injury was imminent.’<sup>58</sup> In Weinfeld’s view ‘Directing criminal liability toward the individual who helped to create or allowed the creation of a risk, rather than toward an individual who merely was aware that the risk existed and disregarded it, more effectively identifies the level of corporate supervisor that should be held accountable.’<sup>59</sup> Weinfeld’s formulation posits that one should not direct liability at a particular structural level simply because of its position but at the appropriate level that is able to prevent the death or injury.<sup>60</sup>

One of the principal reasons advanced for individual prosecution is one based on deterrence. There is a belief shared by many commentators that individuals are more responsive to prosecution and therefore more likely to be deterred by the attachment of criminal liability. Moreover, there is a suggestion that business executives are different from conventional offenders and that they are more likely to be deterred by criminal prosecution.<sup>61</sup> It has been suggested that the fear of indictment in the absence of prosecution may deter individuals.<sup>62</sup> Corporate executives do appear extremely sensitive to imprisonment and status deprivation.<sup>63</sup> Exposure to individual prosecution clearly has an impact on others.<sup>64</sup> However, according to Cullen, ‘Most commentators have missed this point. Although they realize that an individual prosecution can inflict a range of disabilities on an executive and scare other straight, they have assumed implicitly that sanctions directed at corporate entities leave executives personally unaffected.’<sup>65</sup> Moreover, corporate criminal liability acts as an incentive to senior managers to influence the conduct of subordinates.<sup>66</sup> Individual liability puts corporate actors on guard

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<sup>58</sup> Weinfeld, ‘*Criminal Liability Of Corporate Managers For Deaths Of Their Employees*’ 1982 46 Albany Law Review 655-685 at p. 681.

<sup>59</sup> Weinfeld, n. 58 at p. 682.

<sup>60</sup> Weinfeld, n. 58 at p. 682

<sup>61</sup> F. T. Cullen, Maakestad, and Cavender, *Corporate Crime Under Attack: The Ford Pinto Case And Beyond*, (1987), at p. 344; Braithwaite, *Corporate Crime In the Pharmaceutical Industry*, (1984), at p. 319; H. Ball and L. Friedman, ‘*The Use Of Criminal Sanctions In The Enforcement Of Economic Legislation: A Sociological View*’ 1965 17 Stanford L. R. 197-223 at p. 217; see also Laughran, ‘*The Law And The Corporate Polluter*’ 1972 23 Mercier L. R. 571 at p. 587

<sup>62</sup> Developments, n. 40 at p. 1367.

<sup>63</sup> Geis in Ermann and Lundman (Eds.), *Corporate And Government Deviance* (1996 5th Ed.) at p. 278.

<sup>64</sup> Renfrew, ‘*The Paper Label Sentences*’ 1977 86 Yale Law Journal 590 at p. 604.

<sup>65</sup> Cullen et al., n. 61 at p. 349

<sup>66</sup> Cullen et al., n. 61 at p. 352.

against doing an individually culpable act, but it gives no incentives for the prevention of collective wrongs.<sup>67</sup> As Sethi explains 'The assumption here is that imposing penalties on managers will divert the same ingenuity and resourcefulness that has previously been employed to further corporate growth and subvert legal requirements toward directions considered socially more desirable.'<sup>68</sup> There is, accordingly, a view that if you take care of the individuals, corporations will take care of themselves.<sup>69</sup> This view represents a limited strategy; the real need is ultimately to take care of both.

According to McAdams and Tower the criminal law is a focal point in the movement for enhanced personal accountability<sup>70</sup> but that may be problematic in that

'Highly capable individuals may be discouraged from assuming managerial roles. In the short term, the capital needs of corporations may become more difficult to satisfy as the risks of doing business expand. And in the long term, the private enterprise system may require alteration as its social and economic effectiveness is severely tested. From the businessman's point of view the personal accountability trend may appear to be inimical to corporate interests, but we believe that the long term self interest of the business community calls for support of the movement toward increased liability...The robust success of the business community is dependent upon building substantial congruence between executive behaviour and the values and aspirations of the larger society. Active pursuit of enhanced personal accountability would constitute an important ingredient in restoring public approval of the business sector.'<sup>71</sup>

Coleman<sup>72</sup> and Geis,<sup>73</sup> have both argued that pursuing individual corporate officers is better than pursuing the entity.<sup>74</sup> Remedial procedures and punishment of

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<sup>67</sup> Braithwaite, *op cit.* n. 61 at p. 327.

<sup>68</sup> Sethi, n. 16 at p. 202.

<sup>69</sup> Geis and Dimento in Pearce and Snider (Eds.), n. 5 at p. 74.; It was reported in Time (1984), at p. 21, that individuals felt terrible about the tragedy (Bhopal). Indicative that corporate shame can be inflicted on individuals in those corporations who violate the law.

<sup>70</sup> McAdams and Towers, n. 31 at p. 68; cf. Fisse and Braithwaite in Findlay and Hogg (Eds.) n. 28 at p 96ff

<sup>71</sup> McAdam and Towers, n. 31 at p. 82.

<sup>72</sup> J. S. Coleman, 'Is Corporate Criminal Liability Really Necessary' 1975 76 29 South Western L. J. 908.

<sup>73</sup> G. Geis, 'Criminal Penalties For Corporate Criminals' 1972 8 Criminal L. B. 377-392 at p. 390.

<sup>74</sup> Iseman, 'The Criminal Responsibility Of Corporate Officials For Pollution Of The Environment' 1972 37 Albany Law Review 61-96 at p. 63.

individuals it is argued are sufficient to control corporate crime.<sup>75</sup> Caroline meanwhile adopts a fundamentalist position that criminal law is personal.<sup>76</sup> Lederman also contends that expanding criminal liability to corporations can only be justified on the basis that it encourages increased obedience to the law but even she gravitates towards the fundamentalism of individual liability.<sup>77</sup> She also takes the view that assessment of whether corporate criminal liability has a corresponding impact on individual liability can only be assessed theoretically because of the lack of empirical data. The human actors within the corporation and comprising it (shareholders) absorb the sanction. Accordingly, the impact of retribution is minimised because the retribution is not directed against the actual offender.<sup>78</sup> Lederman similarly rejects deterrence as basis for the imposition of corporate criminal liability on the basis that 'Deterrence ..becomes discredited because often the corporate liability does not supplement the liability of the perpetrators but rather replaces it.'<sup>79</sup> According to Lederman, 'Some jurists have defended imposing liability on the corporation alone on grounds of justice, convenience and economic considerations exclusively, and see no flaw in such reasoning even when the identity of the perpetrator is known.'<sup>80</sup> Lederman views concentration on corporate criminal liability in the face of difficulties of individual liability as 'capitulation.'<sup>81</sup> Lederman's rationale is simple- 'the penal system is designed to protect the public order by directing its commands to individuals and threatening them with punishment in case of violation. It should strive to achieve its goal in a similar manner where human activity within the framework of the

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<sup>75</sup> Lederman offers the view that criminal liability should be exclusively individual. 'Penal law, being a prescriptive branch of law, purports to direct the behaviour of individuals in accordance with society's interests and values. A prerequisite for the achievement of this goal is transmitting the criminal dictates to an addressee capable of grasping the message, namely the human consciousness..the justification for punishing violators rest mainly on the assumption that it will deter future conscious violation by the transgressor and others..This cohesive link within criminal law, between the commanding authority and the conscious individual who alone is susceptible to guidance, is threatened when confronted with the imputation of criminal liability to corporations, which by their very nature lack any consciousness.' see Lederman, n. 36 at p. 296

<sup>76</sup> M. W. Caroline, '*Corporate Criminality And The Courts: Where Are They Going?*' 1985 17 Criminal L. Q. 237-256 at p. 249.

<sup>77</sup> Lederman, n. 36 at p. 314.

<sup>78</sup> Lederman, n. 36 at p. 315.

<sup>79</sup> Lederman, n. 36 at p. 316.

<sup>80</sup> Lederman, n. 36 at p. 316

<sup>81</sup> Lederman, n. 36 at p. 318.



corporate bodies is concerned.’<sup>82</sup> Such a view represents a policy view devoid of pragmatism and is based on the notion that corporation is merely a tool for the advancement of the criminal act. However, Lederman proposes that such liability should attach to particular functionaries within the corporate hierarchy who, to avoid liability, will be required to establish that they were not involved in the commission of the offence<sup>83</sup> or, in respect of omissions that they took all necessary precautions. Clearly, such an approach countenances increased managerial and supervisory involvement of officers of a corporation. This will involve attempting to prevent criminal acts of subordinates. The power to control and supervise, must inevitably also entail duties.<sup>84</sup> Lederman’s model envisages a duty to prevent transgressions but not a proactive reporting role. Those directors or managers who fail to fulfil their duty will be embroiled in criminal liability by way of complicity. She argues,

‘The duty of the senior officers to act derives from their relationship with their subordinates as well as from obligations imposed by public interest. Therefore, in terms of the *actus reus*, any director, manager or other supervisor who is aware of the employee’s criminal design and is able to take preventive measures but does nothing contributes to the performance of the offense. With respect to the *mens rea*, such a conscious failure to take preventive measures is an omission which reflects that person’s intent to aid in the commission of the offense.’<sup>85</sup>

The concept of reductionism whereby the corporation is reduced to its constituent parts is overly simplistic. Individuals influence others; they might influence the corporate entity as a whole. Reductionism fails according to Fisse because, ‘the whole is always more than the sum of the individual parts.’<sup>86</sup> The interaction of the collective and the individual raises a real dilemma which pressurise an unnecessary choice whereas the correct

‘task is to explore how wholes are created out of purposive individual action, and how individual action is constituted and constrained by the structural realities of the wholes’<sup>87</sup>

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<sup>82</sup> Lederman, n. 36 at p. 324.

<sup>83</sup> Lederman, n. 36 at p. 327.

<sup>84</sup> Lederman, n. 36 at p. 328.

<sup>85</sup> Lederman, n. 36 at p. 328.

<sup>86</sup> Fisse, n. 18 at p. 479.

<sup>87</sup> Fisse, n. 18 at p. 481.

Even some zealous individualists concede that there may be circumstances in which corporate liability is appropriate. On the basis of reciprocity, it seems incumbent for corporatists to concede that there are often situations where punishing the individual is highly appropriate. Indeed one could go further and support individualism as an integral element of any system of corporate criminal liability. Selection of the best elements of individualism and rejection of its attempts at supremacy over corporate liability remain central to my own model outlined in chapter 6.

### 3.2 Some Problems Of An Individualistic Strategy

One of the most obvious problems of pursuing an individualistic strategy concerns the identification of the individual within the organisation who will become the law's target. Organisational structure often masks the guilty individual. Sethi, for example, suggests that there is an impossible burden on society to isolate individual offender within the corporate form.<sup>88</sup> There is confusion among many of the commentators as to the true seat of the individual instigators of corporate criminal action. Leigh concluded that the commission of crime is not resolved upon in the boardroom<sup>89</sup> and that most reported cases relate to middle management.<sup>90</sup> Clinard on the other hand has described managers as the 'oppressed middle.'<sup>91</sup> There is genuine concern that sanctions might fall capriciously on innocent parties.<sup>92</sup> It has been suggested that one way to enhance the clarity of the responsible official is to specify the level of manager liable and as such the managerial level of liability.<sup>93</sup> Ironically though, even where the specific wrongdoer is identified, a policy of individualism further confronts the problem

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<sup>88</sup> Sethi, n. 16 at p. 210.

<sup>89</sup> L. H. Leigh, *The Criminal Liability Of Corporations In English Law*, (1969), at p. 138.

<sup>90</sup> Leigh, n. 89 at p. 139; see also Braithwaite in P. R. Wilson and J. Braithwaite, n. 8 at p. 108.

<sup>91</sup> Clinard, n. 6 at p.21ff.

<sup>92</sup> The Methven Committee set up to look at the Trade Descriptions Act suggested that lower level employees should only be prosecuted in exceptional circumstances see Review of the Trade Descriptions Act 1968 (Cmnd 6628) para 62.; cf. Clarkson, 'Kicking Corporate Bodies And Damning Their Souls' 1996 59 Modern Law Review 557-572

<sup>93</sup> Sethi, n. 16 at p. 215.

that individuals located within the organisation may be beyond the jurisdiction of the courts.<sup>94</sup>

It is the very mechanics of the operation of the complex organisational structures and the human behaviour within them which create most problems. Often the first impression is that there has been some individual failing but on examination it becomes apparent that there has been a collective failing on the part of the organisation.<sup>95</sup> The pursuit of individual perpetrators within the corporate organisation while potentially fruitful should not obscure the fact that,

‘While organisations cannot act independently of the people that constitute them, it does not follow that determination of the culpability of individuals should be the primary focus of sociological investigations. Pre-occupation with individuals can lead us to underestimate the pressures within society and organizational structures which impel those individuals to commit illegal acts.’<sup>96</sup>

Even in situation where individuals are the protagonists, identification may prove particularly difficult because the perpetrator has utilised his or her position within the company to insulate him or her from liability. Coffee offers the image of the ‘shut-eyed sentry’ who deliberately averts his glance to avoid witnessing misconduct.<sup>97</sup> McVisk argues that corporate executives should not be allowed to hide behind ‘a veil of claimed ignorance’ but equally that they should not be subjected to unrealistic expectations.<sup>98</sup> Ignorance and insulation could conceivably be cured by rotation.<sup>99</sup>

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<sup>94</sup> *The Sunday Times* reports that forty of the biggest firms in the UK now have foreign chairmen 16/3/97 Business Focus at p. 3.

<sup>95</sup> French, *Collective And Corporate Responsibility* (1979) at p. 152.

<sup>96</sup> L. S. Schrager and J. F. Short, ‘Towards A Sociology Of Organised Crime’ 1978 25 Social Problems 407-419 at p. 410

<sup>97</sup> Coffee, ‘Beyond The Shut-Eyed Sentry: Toward A Theoretical View Of Corporate Misconduct And An Effective Legal Response’ 1977 63 Virginia L. R. 1099 at p. 1107; see also Wilson and Braithwaite, n. 6 at p. 203; Example of insulation from knowledge is found in Electric cases see C. Walton and F. Cleveland, *Corporations On Trial: The Electric Cases*, (1964), at p. 70

<sup>98</sup> W. McVisk, ‘Toward A Rational Theory Of Criminal Liability For The Corporate Executive’ 1978 69 Journal of Criminal Law and Criminology 75 at p. 89.

<sup>99</sup> Katz, ‘Concerted Ignorance: The Social Construction Of Cover-Up’ 1979 8 Urban Life 295 at p. 306.

Whilst it is obvious that individuals within the organisation hope to evade apprehension,<sup>100</sup> the mechanisms by which they hope to evade prosecution are not so obvious. According to Katz, strategic ignorance insulates the individual from the group's culpability. What makes strategic ignorance of 'particular interest to sociologists is that it is not an individual achievement. Both superordinates and subordinates and insiders and outsiders have common interests in limiting the knowledge each obtains about the other.'<sup>101</sup> Also, there is evidence that were the relationship between the directors and management replaced by an adversarial atmosphere then that would increase secrecy rather than reduce it.<sup>102</sup> Ermann and Lundman see the failure as emanating from the top of the organisation. They argue 'Once corporate crime is set in motion by top-level executives, the nature of social roles in large organisations limits the information and responsibilities of other participants.'<sup>103</sup> No one has complete information and none have complete responsibility,<sup>104</sup> but despite this the sum may amount to criminality.<sup>105</sup> Collective forms of deviance, it would seem derive significantly from routine expectations of ignorance. Subordinates are expected to carry out their orders without understanding the implications.<sup>106</sup> They defer to supposedly superior expert opinion and as a consequence fail to resist certain orders irrespective of how visibly damaging they are.<sup>107</sup> Naturally it is appropriate,

'to know what a person's power was with respect to some event for which he is being held to account'.....'Persons who can be shown to have been impotent with respect to an outcome caused by a group of which they just happen to be members are usually excused from bearing responsibility for the outcome, though they may bear the blemish of guilt by association...Questions of whether a member of a group knew he had some power to bring about a different outcome or whether he should have known that he did, must be settled before ascription of legal and moral responsibility are justly laid upon him.'<sup>108</sup>

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<sup>100</sup> Geis in M. D. Ermann and R. J. Lundman (Eds.), n. 63 at p. 103.

<sup>101</sup> Katz, n. 99 at p. 297.

<sup>102</sup> Coffee, n. 97 at p. 1108.

<sup>103</sup> Ermann and Lundman in H. Edelherzt and T. Overcast (Eds.), *White-Collar Crime - An Agenda For Research*, (1982), at p. 60.

<sup>104</sup> Ermann and Lundman, n. 103 at p. 61.

<sup>105</sup> Ermann and Lundman, n. 103 at p. 62.

<sup>106</sup> Katz, n. 99 at p. 295-6.

<sup>107</sup> Katz, n. 99 at p. 296.

<sup>108</sup> Stone, 'Controlling Corporate Misconduct' 1977 48 Public Interest 55-71

Clinard and Yeager suggest that some corporate executives by virtue of their power constitute 'a small government unto themselves.'<sup>109</sup> Despite this it must also be recognised that 'The power that attaches to the executive or managerial office, by and large, is not purely derivative, if at all, of an agency transfer from the aggregate stockholders or aggregate board of directors or from any other collectivity.'<sup>110</sup> Brickey recognises that many corporate operatives who regularly exercise decision making authority hold no title or office, high ranking officers may exercise little or no involvement whilst junior ranking officers may exercise considerable authority and a wide range of functions.<sup>111</sup> She goes on to record the absurdity of expectation that all corporate misdeeds will be recorded in resolutions of the Board of Directors.<sup>112</sup> Schaff like others argues that 'evidence of his [the actor] indirect participation in the criminal activity is often hidden beneath multiple layers of corporate decision making.'<sup>113</sup> A manager can directly or indirectly participate in the commission of a crime. Direct participation in the commission would be evidenced by authorisation or consent whereas, indirect participation would be evidenced by knowledge and acquiescence.<sup>114</sup> Need there be a link between the concepts of power and responsibility? In *US v Park* the court argued that 'the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.' Whereas in *United States v Laffal* the court supported the notion that the directing heads of the corporation may be held criminally liable for the acts of subordinates done in the normal course of business, regardless of whether or not those directing heads personally supervised the particular acts done or were personally present at the time and place of commission of these acts. In *US v Andreadis*<sup>115</sup> the court was prepared to hold a manager guilty of an intent crime where he had failed to exercise a duty to supervise. The question

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<sup>109</sup> They note that in only 1.5% of examples in their study was the corporate executive convicted Clinard and Yeager, n. 9 at p. 272.

<sup>110</sup> Stone, n. 108 at pp. 66-7.

<sup>111</sup> Brickey, 'Rethinking Corporate Liability Under The Model Penal Code' 1988 19 Rutgers Law Review 593-634 at p. 626.; see also C. D. Stone, n. 108 at p. 67

<sup>112</sup> Brickey, n. 111 at p. 627.

<sup>113</sup> Schaff, 'Indirect Criminal Conduct Of Corporate Officers' 1988 13 Delaware Journal of Corporate Law 137-164 at p. 137.

<sup>114</sup> Weinfeld, n. 58 at p. 665.

<sup>115</sup> 366 F 2d 423 (2nd Cir, 1966)



is one of disentangling delegated authority, managerial discretion and ultimate responsibility.<sup>116</sup> However, it is important, in the view of the writer, to accept that 'if the crime is truly a corporate one, it will also be an affront to justice to punish any individual employee or manager or director when such persons usually can demonstrate that they did not have the relevant intention nor the required capacities to constitute the mens rea required by the law for successful prosecution.'<sup>117</sup> Assuming that certain individuals are to be pursued, the obvious individuals to be prosecuted are company directors who retain both a pivotal role in the control and direction of the corporation. Given our pre-occupation with hierarchical connotations, (evident in our attachment to the identification doctrine)<sup>118</sup> it is inevitable that we should look to those who have power to also have responsibility.

### **Punishing Company Directors**

As I have noted, directors are increasingly being looked to when things go wrong in corporate affairs.<sup>119</sup> A feature of the enhanced burden of responsibility is that statutes have increased the scope for criminal liability of directors and officers.<sup>120</sup> There are those who are strongly supportive of such an approach and indeed wish to go further. Davids, for example, suggests that a specific legal duty of supervision may be imposed upon top management so that they would be liable for not informing themselves of subordinates' activities where these prove to be unlawful.<sup>121</sup> Finch poses the question why these corporate agents should be liable when the law should encourage wealth creation and at the same time discourage corporate wrongdoing.<sup>122</sup> Where 'the behaviour at issue is not highly blameworthy individual misconduct but actions that are either less obviously reprehensible or less within the control of the individual...the case for individual liability weakens.'

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<sup>116</sup> Clinard and Yeager, n. 9 at p. 279.

<sup>117</sup> French in Fisse and French (Eds.), n. 38 at p. 160.

<sup>118</sup> See Chapter 2 of this thesis.

<sup>119</sup> V. Finch, n. 41 at p. 880; see R. R. Pennington, *Directors Personal Liability*, (1987); Wells 'Corporate Killing' 1997 NLJ 1467-8

<sup>120</sup> See e.g. Environmental Protection Act 1990 s. 157; Health and Safety Act s. 37; see C. Wells, 'Organisational Responses To The Risk of Criminal Liability' 1995 University of York Paper at p. 10.

<sup>121</sup> Davids, 'Penology And Corporate Crime' 1967 58 Journal of Criminal Law, Criminology and Police Science 524-32 at p. 530.

<sup>122</sup> Finch, n. 41 at p. 881.

Whatever else may be said, there has been an evolution of the director from simply a figurehead to a modern fiduciary.<sup>123</sup>

Whilst it has been argued that the board's primary role is to actively check management,<sup>124</sup> the real power of directors in running the company has been criticised.<sup>125</sup> Finch, for example, suggests that the reality is directors are kept in the dark.<sup>126</sup> Coffee devised the idea of the crow's nest analogy. However, as Braithwaite has noted 'The point about Coffee's use of the crow's nest analogy is that communications from both the crow's nest and the boiler room run to the bridge, where top management holds the helm.'<sup>127</sup> Riley meanwhile describes the realism that the Board is influential as 'unrealistic.'<sup>128</sup> Empirical observers of corporate reality note that the Board's influence is feeble.<sup>129</sup>

In the corporate hierarchy it is not only the directors and the CEOs who come under scrutiny. Executives within the hierarchies are also appropriate targets for criminal liability. No easy caricature of business executives is possible.<sup>130</sup> As a consequence, assessing the criminal pathology of the individual criminal operating within the corporate form is often difficult. Many see the malevolent caricature as simply not reflective of most businessmen. For example Bremner and Mollander argue that 'Those critics who continue to characterize the American business executive as a power hungry, profit bound individualist, indifferent to the needs of society should be put on notice that they are now dealing with a straw man of their own making.'<sup>131</sup>

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<sup>123</sup> Oleck, n. 20 at p. 472.

<sup>124</sup> Goldschmid, 'The Greening Of The Boardroom: Reflections On Corporate Responsibility' (1973), at pp. 24-25.

<sup>125</sup> See V. Finch, 'Company Directors Who Cares About Skill And Care' 1992 55 Modern L. R. 179.

<sup>126</sup> Finch, n. 125 at p. 197.

<sup>127</sup> Braithwaite, n. 61 at p 363

<sup>128</sup> C. A. Riley, 'Controlling Corporate Management: UK And US Initiatives' 1994 14 (2) Legal Studies 244-265 at p. 246.

<sup>129</sup> Braithwaite, n. 61 at p. 363; see also Townsend, *Up the Organisation*, (1970), at p. 49 quoted in Goldschmid, n. 124 at p. 19.

<sup>130</sup> F. T. Cullen and P. J. Dubeck, 'The Myth Of Corporate Immunity To Deterrence: Ideology And The Creation Of The Invincible Criminal' 1985 49 Federal Probation 3 at p. 7.

<sup>131</sup> Bremner, S N and Molander, E A, 'Is The Ethics Of Business Changing?' Harvard Business Review 1977, at pp. 68-9 quoted in Cullen and Dubeck, n. 130 at p. 7.

What about the role of non-executive directors?<sup>132</sup> Finch observes their problem; as one where,

'The outsider faces severe obstacles in monitoring board activity and the prospect of being held personally liable for failing in such monitoring functions may prove an excessive deterrent to non-executive direction, notably when the economic benefits of non-executive direction are seen to be dwarfed by potential liabilities for damages.'<sup>133</sup>

The White Paper on conduct of directors<sup>134</sup> suggested that NEDs should offer independent supervision of company's management but that to do so he or she will require access to company information. In America, the use of non-executive directors is pervasive.<sup>135</sup> Kesner, Victor and Lamont have examined whether outside representation on company boards impacts on the level of illegality.<sup>136</sup> However, despite *prima facie* objections and underlying perceptions that independence of outsiders would restrict corporate illegality, they found that there was no correlation between the number of outsiders and offences. One way that might be explained is that previous illegal acts resulted in changes to the board of directors. Superficially, it might also suggest that illegality occurs at a lower level than officer level.

In larger organisations the role of Chief Executive Officer (CEO) is likely to be of great importance. It is he, or she, who will wield most power, and he, or she, who will be most influential.<sup>137</sup> However, to simply pursue the CEO in every case would be to place him or her in an absurd position of sacrifice.<sup>138</sup> Irrespective of

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<sup>132</sup> The issue of governance has been of some importance in Anglo-American Jurisprudence. In United States the American Law Institute commissioned a Corporate Governance Project in 1978; whilst in the UK the Cadbury Committee reported in 1991. The Corporate Governance Project emphasised the monitoring role of the board but Cadbury was less enthusiastic. The Corporate Governance project wanted independent directors not NEDs and in large publicly held corporations they should be in the majority. Cadbury wanted NEDs and independent directors but was less specific about numbers. see Riley n. 128.

<sup>133</sup> Finch, n. 41 at p. 885.

<sup>134</sup> Cmnd 7037 (1977) paras 19-21.

<sup>135</sup> Riley, n. 128 at p. 247; Braithwaite, n. 61 at p. 362.

<sup>136</sup> I. Kesner, B. Victor and B. Lamont, 'Board Composition And The Commission Of Illegal Acts: An Investigation Of Fortune 500 Companies' 1986 29 Academy of Management Journal 789-799.

<sup>137</sup> In *US v Laffal* 83 Ad 871 (DC Mun Ct of App 1951) it was suggested that a chief executive is acquainted with all the business affairs of the corporations

<sup>138</sup> Lee, 'Corporate Criminal Responsibility' 1928 28 Columbia L. R 181, at p. 194.

this it does seem clear that there must be a strong personal commitment on the part of Chief Executives to corporate responsibility if corporate criminality is to be avoided.<sup>139</sup> In Clinard's study the CEO's attitude was found to be a very important reason for violations according to executives within corporations.<sup>140</sup>

Generally corporate directors are endowed with immense discretion though sometimes 'the board is simply a fictional project of the president himself.'<sup>141</sup> Rafalko poses the thought that one has no way of knowing whether an executive dissented from the decision of the senior organ of corporate government.<sup>142</sup> Many believe that 'the power of corporate management is becoming practically absolute, while social controls upon this power remain almost embryonic';<sup>143</sup> in the process any hope of corporate democracy is fallacious.<sup>144</sup> Stockholders obey the management not the other way around and as has been suggested,

'it is almost hopeless to expect that the electoral process can ever become anything more significant than an empty ritual. No amount of disclosure can make corporate democracy effective where the corporate vote belongs to weak, scattered individual investors or to institutional investors who cannot or will not take effective part in the corporate electoral process for the endocratic corporation the corporate election is frequently not a partial but a total farce.'<sup>145</sup>

There are those who believe that the significance of the board should be discounted<sup>146</sup> and that 'the "fiduciary ideology" of corporate law has resulted in a tunnel vision that has led reformers to frame issues of corporate accountability in terms of how a fiduciary would behave if guided by "the punctilio of an honor the most sensitive". Unfortunately not all problems reduce themselves neatly to such questions of honorable conduct or are resolvable simply by exercising other admirable virtues, such as diligence and foresight. Some problems ...seem to require structural reform, a possibility that fiduciary ideology inherently

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<sup>139</sup> Goldschmid, n. 124 at p. 30.

<sup>140</sup> See Clinard, n. 6 at p. 54.

<sup>141</sup> Rostow in Mason (Ed.), *The Corporation in Modern Society*, (1961), at p. 51.

<sup>142</sup> R. J. Rafalko, 'Corporate Punishment: A Proposal' 1989 8 *Journal of Business Ethics* 917-28 at p. 923.

<sup>143</sup> A. A. Berle, *Studies In The Law Of Corporate Finance*, (1928), at p. 27.

<sup>144</sup> Rostow in Mason, n. 141 at p. 53.

<sup>145</sup> Rostow, n. 141 at p. 54.

<sup>146</sup> Coffee, n. 97 at p. 1110.

ignores.’<sup>147</sup> Coffee suggests creating minibboards as satellites of the main boards at the apex of each division of the corporation; the main board would have heightened monitoring capacity over satellite boards.<sup>148</sup> The principal criticisms of minibboards are that they would spy on divisional officers and they would create adversarial relationships.<sup>149</sup> Under Coffee’s scheme mini board chairmen would be on the main board providing an interlocking presence. One of the principal aims of the mini board is that it seeks to place monitoring closer to the locus of problems within the corporate structure.<sup>150</sup> Meuller argues for a different approach with the appointment of one public director by the agency incorporating the company.<sup>151</sup> Yet again though the arid choice of solution seems unnecessary. We can have the best of all worlds by retaining the notion of fiduciary care and more overt intrusiveness. It is simply a question of working out the most efficacious process of reconciling both.

### **The Impact Of Insurance And Indemnification**

Stone argues that ‘Indemnification and its surrogates have the power not only to undo the law’s judgments against executives who have been caught; they also lend themselves to undermining prosecutorial efforts against others.’<sup>152</sup> Directors & Officers insurance may impact on the retributive effect of personal liability in that it will spread the risk for the director. Because of that, there is a seasoned view that holds that criminal liability should be uninsurable.<sup>153</sup> Finch offers a damning critique of such insurance; she points out that ‘insurance could be said to subvert public policy, encourage unscrupulous directors to pursue questionable activities and dull the incentives of honest directors to be attentive to their duties and act in the best interests of their company.’<sup>154</sup> On the other hand it might directly influence the monitoring of wrongdoing within the corporation either through the company, its directors or through its insurers. Indeed Insurers may offer incentives by way of

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<sup>147</sup> Coffee, n. 97 at p. 1111.

<sup>148</sup> Coffee, n. 97 at p. 1149.

<sup>149</sup> Coffee, n. 97 at pp. 1150-1.

<sup>150</sup> Coffee, n. 97 at p. 1155.

<sup>151</sup> See Nader and Green, n. 11 at p. 127.

<sup>152</sup> Stone, n. 108 at p. 55.

<sup>153</sup> Finch, n. 41 at p. 887.

<sup>154</sup> Finch, n. 41 at p. 888.



reduced premiums and the disincentive of not re-insuring. Finch notes that 'where insurers fail to identify potential risk avoidance techniques or do not discriminate between risks and link premiums to performance, companies may be afflicted with a culture in which misdemeanours and resultant costs come to be seen as normal business expense to be met in the first instance by insurers and thereafter by shareholders or consumers.'<sup>155</sup> Where courts are made aware of the presence of insurance cover, they may depart from considerations of directorial fault and move towards objectives of compensation and loss spreading.<sup>156</sup>

Yoder argues for a prohibition on indemnification for criminal violations.<sup>157</sup> The policy objection comes into play when indemnification takes the form of reimbursing agents for fines and penalties, a practice that amounts to little more than permitting the parties 'by private agreement, to undo society's judgment as to the appropriate deterrent strategy.'<sup>158</sup> Anderson contends that the use of indemnity insurance subverts (at least in part) the notion of deterrence by shifting the burden to a third party.<sup>159</sup> Corporations might seek to recover losses from officers who involve their companies in corporate crime.<sup>160</sup> However, one of the problems is that company may be *prima facie* a party to the crime under the identification doctrine.<sup>161</sup> Fisse says 'although it is true that indemnification of sentences is contrary to public policy and subject to explicit prohibition both under the doctrine of *ultra vires* and under specific statutory provisions, in practice these legal obstacles are surmountable by means of suitably disguised payments.'<sup>162</sup> Restriction of indemnification of criminal penalties whilst viewed as important is not a central feature of this thesis.

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<sup>155</sup> Finch, n. 41 at p. 889.

<sup>156</sup> Finch, n. 41 at p. 891.

<sup>157</sup> Yoder, 'Criminal Sanctions For Corporate Illegality' 1978 69 Journal of Criminal Law and Criminology 40-58 at p. 55.

<sup>158</sup> Yoder, op cit. n. 157 at p. 48.

<sup>159</sup> Anderson, 'Corporate Homicide: The Stark Realities Of Artificial Beings And Legal Fictions' 1981 8 Pepperdine Law Journal 367-417 at p. 389.

<sup>160</sup> W. W. I. Ming, 'The Recovery Of Losses Occasioned By Corporate Crime' 1983 25 Malaya L. R. 271-294 at p. 271.

<sup>161</sup> However note Belmont Finance Corporation Ltd v William Furniture Ltd [1979] 1 All ER 118.

<sup>162</sup> Fisse, 'The Social Policy Of Corporate Criminal Responsibility' 1978 6 Adelaide L. R. 361-412 at p. 378.

## Prosecutorial Problems

The punishment of an individual is often fraught with difficulty not least because of the accused's standing. Spiegelhoff offering a caricature of the individual offender points out that 'Pre-sentence reports often reveal that the corporate defendant is married and has children, that he is reported to be a good parent, that he is active in the church and local charities, and that he is a professional person with clients who are dependant on him.'<sup>163</sup> Clinard and Yeager also note the limitations of the law and its sanctions when dealing with the offending executive.<sup>164</sup> According to them, such offenders are not viewed in the same manner as other criminals despite the harm they may cause. Most white-collar criminals are treated as if they are first offenders;<sup>165</sup> community service orders are frequently imposed on corporate actors individually prosecuted.<sup>166</sup> The arguments marshalled in appeals for leniency of sentence for white-collar offenders are age and poor health, personal and family reasons, extent of punishment by simply being indicted, offence is not immoral, prior record of the accused, incarceration would accomplish nothing, contrition of the defendant, and victimisation of the defendant in prison because of his status.<sup>167</sup> Often individuals prosecuted for corporate crimes will be acquitted. According to Goodwin,

'This phenomenon[of acquittal of individuals] perhaps reflects an intuitive feeling by jurors that individuals acting within the pressures of a bureaucratic and sometimes highly diffuse corporate structure are often unwitting or even unwilling participants in an illegal transaction.'<sup>168</sup>

Dauids offers an insight into how judges often approach disposal of individual corporate defendants by explaining that,

'Imprisoning particular individuals whose malfeasance involved the participation of the collectivity in which they formed but a small part appears very inequitable and therefore discourages the imposition of punishment by judges and juries imbued with Anglo-American concepts of fair play.'<sup>169</sup>

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<sup>163</sup> Spiegelhoff, n. 52 at p. 626.

<sup>164</sup> Clinard and Yeager, n. 9 at p. 284 et seq.

<sup>165</sup> Clinard and Yeager, n. 9 at p. 288.

<sup>166</sup> Spiegelhoff, n. 52 at p. 626

<sup>167</sup> Clinard and Yeager, n. 9 at pp. 289-292.

<sup>168</sup> Goodwin 'Individual Liability Of Agents For Corporate Crimes Under The Proposed Federal Criminal Code' 1978 31 Vanderbilt Law Review 965-1016 at p. 968.

<sup>169</sup> Dauids, n. 121 at p. 527.

The drafters of the American Model Penal Code also noted the tendency of courts to acquit individual actors where the corporation also stands accused. They commented that

‘This may reflect more than a faulty or capricious judgment on the part of juries. It may represent a recognition that the social consequences of a criminal conviction may fall with a disproportionately heavy import on the individual defendants where the conduct involved is not of a highly immoral character. It may also reflect a shrewd belief that the violation may have been produced by pressures on the subordinate officers created by corporate managerial officials even though the latter may not have intended or desired the criminal behaviour and even though the pressures can only be sensed rather than demonstrated.’<sup>170</sup>

The reluctance to punish may emanate from the judge’s own discretion. He may recognise that punishing the individual may lead to damage in professional standing.<sup>171</sup> There may also be judicial reluctance to punish the offender when the judge feels that the individual has been punished enough through the process of trial and conviction.<sup>172</sup> Judges are often influenced by professional standing of white collar criminals<sup>173</sup> and their ability to make restitution to victims.<sup>174</sup> According to Yohay and Dodge, where individuals are charged along with corporations prosecutions will often direct their attention to the corporation.<sup>175</sup> In *US v Nearing*, it was explained,

‘In indictments for crime, where human beings are jointly tried with corporations, the human interest naturally centres around the living individual. During the trial the corporation is a sort of abstraction, and seems rather a secondary figure. The human being may lose his liberty if convicted, whilst the worst that can happen to the corporation is the imposition of a fine. Their purpose in prosecuting the individual may be to ‘provide an additional pocket from which the fines may eventually be

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<sup>170</sup> Model Penal Code Commentary (1956) quoted in Hamilton, n. 56 at p. 72.

<sup>171</sup> Mann, Wheeler and Sarat, ‘Sentencing The White-Collar Offender’ 1980 17 American C. L. R. 479-500 at p. 485.

<sup>172</sup> Mann, Wheeler and Sarat, n. 171 at p. 486.

<sup>173</sup> Mann et al., n. 171 at p. 490.

<sup>174</sup> Mann et al., n. 171 at p. 491.

<sup>175</sup> S. C. Yohay and E. Dodge, ‘Criminal Prosecutions For Occupational Injuries: An Issue Of Growing Concern’ 1987 13 Employee Relations L. J. 197-233 at p. 212; In one American study 70 % of cases included individual co-defendants M. A. Cohen, ‘Corporate Crime And Punishment: A Study Of Social Harm And Sentencing Practice In The Federal Courts 1984-1987’ 1989 26 American Criminal L. R. 605 at p. 658

recovered but more importantly to create added pressure for a favourable plea.<sup>176</sup>

Individuals are often acquitted when corporation and individual both stand trial.<sup>177</sup> In some economic crimes juries have tended to empathise with the individual and convict the corporation.<sup>178</sup> Contrary to the orthodox line of prosecutors that their priority is to proceed against individuals and that corporations are only secondary targets, the statistics which have been compiled reveal a high incidence of cases where individuals have not been prosecuted or, in the event of prosecution, have not been held liable.<sup>179</sup>

The perception is that in their treatment of white-collar criminals, the courts have failed. They are however not the only ones to have failed. No great faith can be placed in the marketplace to limit officer behaviour. Individual managers may be considered fungible;<sup>180</sup> imprisoned officers might simply be replaced.<sup>181</sup> Boulding says the corporation 'marches on in its elephantine way almost indifferent to its succession of riders.'<sup>182</sup> Liability may of course be evaded by dispensing with expendable officers/employees perhaps at considerable financial gain to that employee. Such an approach clearly subverts the true intention of enforcement agencies and the criminal courts. Finch points out that 'Market based constraints on directorial wrongdoing may be ineffective not merely because of problems of information, collusion within the firm and fluctuations within the market, but through a focus of aggregate performance rather than individual acts and toleration of wrongdoing in the face of other 'successful' actions.'<sup>183</sup> According to Finch,

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<sup>176</sup> Quoted in Edgerton, 'Corporate Criminal Responsibility' 1927 36 Yale L. R. 827-844 at p. 835.

<sup>177</sup> See P. B. Rodella, 'Corporate Criminal Liability For Homicide: Has The Fiction Been Extended Too Far' 1984 4 Journal of Law and Commerce 95-126 at p. 121; c.f. see Foerschler, 'Corporate Criminal Intent: Toward A Better Understanding Of Corporate Misconduct' 1990 78 California Law Review 1287-1311 at pp. 1290-1 who claims that both are often acquitted.

<sup>178</sup> Ball and Friedman, n. 61 at p. 218; Cf. Polinsky and Shavell, 'Should Employees Be Subject To Fines And Imprisonment Given The Existence Of Corporate Liability' 1993 13 International Review of Economics and the Law 239-259 at p. 239.

<sup>179</sup> Findlay and Hogg (Eds.), op cit. n. 28 at p. 97; See also Clinard and Yeager, n. 9 at p. 272. cf. e.g. in Scotland of both being prosecuted *Ross Inns Ltd v Smith* 1987 SLT 121; *Wotherspoon v HMA* 1978 JC 74; *Harry Sarma Ltd. v Adair* 1945 JC 141

<sup>180</sup> Foerschler, n. 177 at p. 1289.

<sup>181</sup> Davids, n. 121 at p. 527.

<sup>182</sup> Boulding *The Organisational Revolution* (1953), at p. 139.

<sup>183</sup> Finch, n. 41 at p. 885

‘Judging the level of deterrence that results from personal liability may...be problematic. Whilst it is true that careers of individual executives may be damaged, in some circumstances, over-deterrence may result in so far as suitable men and women decline to enter company direction for fear of personal liability.’<sup>184</sup> Does extension of the duty of care result in effective deterrence ? Will it make directors less entrepreneurial ? Will risks be externalised to sub-contractors or consultants ? Finch says ‘In either event, inefficiencies may result in so far as managers shy away from decisions, fail to assume responsibilities, desist from establishing effective lines of control and delegate decisions to parties less well positioned to decide.’<sup>185</sup>

Naturally, there is enormous difficulty in policing large numbers of individuals within corporations.<sup>186</sup> Fisse identifies the undermining of individual liability as one of the two major problems associated with attempts to punish the corporate criminal.<sup>187</sup> In his view prosecutors will take a ‘short cut’ and that individual, liability is frequently displaced by corporate liability which now serves as a rough and ready catch-all device.’<sup>188</sup> There are of course some individuals who might justly evade prosecution and,

‘Although the criminal law applies most readily to the individual actors performing the criminal conduct, effective deterrence of corporate crime often requires imposing liability upon supervisory and managerial corporate officials, but not upon subordinate agents who, although committing a proscribed activity, were in fact powerless to realize the results of or to prevent the blameworthy corporate conduct.’<sup>189</sup>

It remains axiomatic however that corporations create, and perpetuate the proper environment whereby individuals within their organisation do not engage in criminal activity.<sup>190</sup>

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<sup>184</sup> Finch, n. 41 at p. 885.

<sup>185</sup> Finch, n. 41 at p. 886.

<sup>186</sup> Fisse, ‘*The Duality Of Corporate And Individual Criminal Liability*’ in *Corporations As Criminals* (Hochstedler Ed.) (1984) at p. 72.

<sup>187</sup> Fisse, n. 18 at p. 468.

<sup>188</sup> Fisse, n. 18 at p. 469; In Australia enforcement agencies surveyed revealed that out of 96 cases 21 targeted individuals and 41 corporations. see Fisse, n. 18 at p. 470.

<sup>189</sup> Fisse and Braithwaite in Fisse and French (Eds.), n. 38 at p. 969.

<sup>190</sup> Jackall in Ermann and Lundman (Eds.), n. 63 at p. 68.



### 3.3 Enterprise Liability

The arguments in support of attaching corporate criminal liability to the enterprise are fairly extensive and represent an integral part of this thesis. Support for enterprise liability can be extended on the positive features of corporatism itself and also failings on the part of a purely individualist strategy. As well as rejection on a philosophical basis,<sup>191</sup> the imperialism of individualism can be attacked on a pragmatic basis. According to Ashworth, reliance solely on individual prosecution is unlikely to work because individuals are dispensable 'allowing the company to continue on its course with minimal disruption; or it might be difficult to identify the individual responsible, not least because the lines of accountability within companies are somewhat unclear.'<sup>192</sup> It has also been suggested that individualism 'lacks sophistication in tackling the question of corporate risk-taking.'<sup>193</sup> Baysinger, for example, claims that the current level of organisational crime exceeds the socially efficient level, and that individual liability has demonstrably lacked the desired deterrent effect.<sup>194</sup> Fisse further suggests that

'The response of the present law to the difficulties of enforcement overload and opacity of organisational lines of accountability is to extend criminal liability to corporate entities in the hope of spurring companies to undertake internal disciplinary action and impose individual accountability as a matter of private policing.'<sup>195</sup>

It is a simple premise which underlies enterprise liability. The supposition that punishment of the entity will lead to a reactive response ensuring compliance with the law.<sup>196</sup> It is deterrent claim which stands comparison with similar claims for individual liability. Fisse explains that,

'The more acute deterrent angle of individualism is the claim that deterrence of corporate crime can be sufficiently achieved by punishing the individual persons responsible for offences. This claim which is difficult to square with the development of corporate criminal liability at

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<sup>191</sup> Scanderett, 'The Obscure Of Criminal Guilt' 27 J Crim L and Criminology 828 at 850 1937 quoted in Seney, 'The Sibyl And The Cumae - Our Criminal Law's Moral Obsolescence' 1971 17 Wayne L. R. 777-858 at p. 807.

<sup>192</sup> Ashworth n. 48 at p. 116.

<sup>193</sup> Wells, n. 120 at p. 11.

<sup>194</sup> B. D. Baysinger, 'Organisation Theory And The Criminal Liability Of Corporations' 1991 71 Boston University L. R. 341-376 at p. 343.

<sup>195</sup> Fisse, n. 18 at p. 496.

<sup>196</sup> Fisse and Braithwaite, n. 18 at p. 59ff

common law or to the use of monetary penalties against companies under statute, under-estimates the difficulties of enforcing individual liability. These difficulties include: enforcement overload; opacity of internal lines of corporate accountability; expandability of individuals with organisations; corporate separation of those responsible for the commission of past offences from those responsible for the prevention of future offences; and corporate safe-harbours of individual suspects.<sup>197</sup>

The traditional value of individual liability can be displaced by the utilisation of corporate liability as a 'catch all' device.<sup>198</sup> Individualism wrongly presumes that accountability within companies can be readily determined but that corporations all too easily conceal bureaucracies and hierarchies.<sup>199</sup> So much so that the corporation must be prosecuted *per se* to counteract the veil of anonymity.<sup>200</sup> Iseman nonetheless clearly disapproves of the situation where the corporation serves as a sacrificial scapegoat whilst the individual goes free.<sup>201</sup> At the other end of the spectrum, pursuit of individuals is often seen as impractical. Fisse argues that 'nothing short of martial law is likely to enable effective enforcement against the numbers of individual suspects involved.' He goes on to say 'individual criminal liability cannot be expected to take over the work of corporate criminal liability unless we are prepared to sacrifice the very traditions of justice and freedom for which individualism stands.'<sup>202</sup> Individual liability is, accordingly, incapable of expressing corporate fault because 'corporate standards and corporate decision-making processes are essential features which transcend the relevance of individual atoms of behaviour.'<sup>203</sup> Corporate liability need not be corporate in impact; the consequences of corporate fault may be internalised. The punishment imposed on the corporation may well impact upon the individuals within that organisation.

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<sup>197</sup> Fisse, n. 18 at p. 494.

<sup>198</sup> Findlay and Hogg (Eds.), n. 28 at p. 94.

<sup>199</sup> Fisse, n. 18 at p. 495.

<sup>200</sup> Fisse n. 162 at 358; The Canadian Law Reform Commission also sees efficiency as a strong rationale for collective liability. J. Fortin, P. J. Fitzgerald and T. Elton, 'Strict Liability In Law' Working Paper of the Canadian Law Reform Commission (1976) at p. 31; see also Fisse n. 186 p. 82.

<sup>201</sup> Iseman n. 74 at p. 65.

<sup>202</sup> Fisse, n. 186 at p. 80.

<sup>203</sup> Fisse, n. 186 at p. 81.

Fisse is surely also correct to note that problem with individual liability in that,

‘The deterrent efficacy of individual criminal liability for corporate crime is further limited by the organisational divorce of responsibility for past offences from the responsibility for future compliance. Deterrence of unlawful behaviour on behalf of organisations depends not merely upon threat induced abstinence from illegality but upon threat-induced catalysis of preventive controls. The personnel held responsible for a past offence, however, are not necessarily in a position to institute effective preventive action within an organisation...Accordingly, there is reason to doubt the wisdom of a deterrent strategy which focuses merely upon individuals responsible for commission of offences in the past. By contrast corporate liability provides an incentive for the management of the day to undertake responsive organisational change whatever the proximity or remoteness of that management’s connection with the events giving rise to prosecution.’<sup>204</sup>

Fisse claims that the assumptions which underpin individualism ‘rest on quicksand.’<sup>205</sup> Desert need not be individual but may be corporate as well.<sup>206</sup>

Fisse notes that,

‘The classic interpretation of retribution stressed the need for vindication or social amends for the evil done, the core idea being justice as fairness. When one moral agent breaks the law while another moral agent bears the burdens of self-restraint, fairness requires the imposition of an off-setting burden on the law breaker. This off-setting burden is punishment. If we accept that corporations are moral agents and that organisations bear burdens of self restraint in complying with the law, then this form of retribution applies to corporate as well as individual persons.’<sup>207</sup>

Corporate criminal liability not only derives its intellectual credence from individualism’s failings; there is an altogether positive rationale for the imposition of criminal liability on corporations. Because of the diversification of the corporate form the argument runs that corporate liability will create incentives for internal corrective action.<sup>208</sup> It is arguably a more efficient means of ensuring deterrence not least because, if the corporation is a closely held corporation punishing the corporation will have a greater impact on the individuals than in a

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<sup>204</sup> Fisse, n. 18 at p. 497.

<sup>205</sup> Fisse, n. 18 at p. 502.

<sup>206</sup> Fisse, n. 18 at p. 503.

<sup>207</sup> Fisse, n. 18 at p 503

<sup>208</sup> Finch, n. 41 at p. 886 op cit.

larger organisation with more diverse shareholdings.<sup>209</sup> Fisse also notes an unfairness in pursuing the individual where the benefit invariably is derived by the corporation. A further reason for corporate liability lies in the necessity that corporations bear the social costs of actions perpetrated on their behalf. If deterrence is to be achieved it is necessary that the illicit profit of corporations does not go untouched.<sup>210</sup> Significantly, it is the recognition of the collectivity which gives enterprise liability its greatest intellectual credence on the basis that,

‘When people blame corporations, they are not merely channelling aggression against the ox that gored or some symbolic object. Nor are they pointing the finger at the individuals behind the corporate mantle. They are condemning the fact that the organisation either implemented a policy of non compliance or failed to exercise its collective capacity to avoid the offence for which blame attaches.’<sup>211</sup>

Corporate blameworthiness has two components- the ability to make decisions and the inexcusable failure to perform an assigned task.<sup>212</sup> Fisse’s balanced perspective is to,

‘hold organisations responsible for a decision when and because that decision instantiates an organisational policy and instantiates an organisational decision-making process which the organisation has chosen for itself. A decision made by a rogue individual in defiance of corporate policy (including unwritten corporate policy), to undermine corporate goals, or in flagrant disregard of corporate decision making rules, is not a decision for which the organisation is morally responsible. That is not to say, however, that we cannot hold the organisation responsible if the intention of individuals is other than to promote corporate goals and policies.’<sup>213</sup>

Donaldson points out that corporations can and should have access to practical and theoretical knowledge which dwarfs that of individuals.<sup>214</sup> As such, implicitly there is a greater onus on them to behave properly. Punishment of the corporation can often have the dual benefit of punishing the responsible entity and at the same time punishing an amalgam of individuals.<sup>215</sup> Stone claims that ‘From a moral

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<sup>209</sup> Hamilton, n. 56 at p. 74.

<sup>210</sup> Fisse, n. 186 at p. 73.

<sup>211</sup> Fisse, n. 18 at p. 482.

<sup>212</sup> Fisse, n. 18 at p. 483.

<sup>213</sup> Fisse, n. 18 at p. 484.

<sup>214</sup> Donaldson, n. 30 op cit. at p. 125.

<sup>215</sup> Fisse, n. 18 at p. 489-490.

perspective, it may seem fairer to make the enterprise bear the burden in preference either to the outsider who has been harmed or to the particular agents whose acts were the most closely linked with the injury, but which were performed under the direction, and for the benefit, of the corporation.<sup>216</sup> Edgerton, rather negatively, offers three reasons for preferring corporate criminal liability over individual liability- individuals may not be readily identifiable, the sheer volume of potential guilty individuals and the opacity of the corporate financial assets.<sup>217</sup> Lederman focuses on the moral responsibility of the corporation and the effectiveness of corporate liability but concludes that individualism is to be preferred.<sup>218</sup> Mueller meanwhile argues that the rationale for corporate crime is anything but clear and 'simply rests on an assumption that such liability is a necessary and useful thing.'<sup>219</sup> Geis and Dimento balancing positive and negative dimensions, suggest the following reasons for preferring corporate criminal liability: (1) a corporation is a distinct sum from those persons who make up the organisation (2) punishing individuals only is not an effective strategy because for employees the risks will be generally less compelling than those related to failure to meet organisational goals (3) shame will be greater on corporations rather than individuals (4) corporations can be redesigned by court sanctions (5) much easier for prosecutors to establish individual guilt (6) corporations have greater assets and as such a greater opportunity for redress of harm.<sup>220</sup> Similarly, Leigh offers a checklist of reasons for corporate criminal liability which can be summarised as-(1) the difficulty in locating the actual offender (2) transference of the policing function to employers (3) the difficulty in implicating top management (4) reluctance on the part of juries to convict individuals facing corporate pressure (5) obtaining compensation from entities (6) convenience and fairness (7) convenience and necessity (8) fairness and social justice- corporations should not be above the law.

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<sup>216</sup> Stone *Where The Law Ends: The Social Control Of Corporate Behaviour* (1975) at p. 13.

<sup>217</sup> Edgerton, n. 176 at p. 834.

<sup>218</sup> Lederman, n. 36 at p. 294.

<sup>219</sup> Mueller, n. 39 at p. 23.

<sup>220</sup> Pearce and Snider (Eds.), n. 5 at pp. 76-7



Even where individuals are blameless we may need to account for the moral sense of indignation against the corporation.<sup>221</sup> Corporate liability may be appropriate where crime arise from corporate criminal negligence rather than the cumulative accrual of liability.<sup>222</sup> According to Fisse 'Where this is so, corporate criminal responsibility complements the deterrent operation of individual criminal responsibility by inducing the corporation sentenced (and others similarly placed) to take greater care, as by adopting further preventative measures, or initiating internal discipline proceedings in respect of those who may have violated the corporation's existing internal precautionary rules.' Fisse outlines three circumstances of corporate negligence- communication breakdown<sup>223</sup> tacit operation of authority<sup>224</sup> and group pressure to conform.<sup>225</sup> In respect of tacit operation of authority Fisse explains that 'Subordinates, instead of acting on explicit instructions, often anticipate the reactions of their superiors by asking themselves what their superiors would wish of them, act accordingly, and then await the superior's retrospective judgment. Where such anticipated reactions occur, not uncommonly they stem from cumulative impressions acquired through experience of corporate attitudes over a lengthy period.'<sup>226</sup> Complex organisations create opportunities by providing diversity of settings and masking behaviour.<sup>227</sup>

In determining whether the imposition of corporate liability is socially desirable Khanna argues that 'one must compare the net benefits of imposing corporate criminal liability with the net benefit of imposing alternative liability strategies.'<sup>228</sup> He lists four alternatives corporate civil liability, civil liability on 'managers', criminal liability imposed on 'managers' or imposing civil or criminal liability on a third party. Khanna argues that, 'Corporate criminal liability has stronger procedural protections, more powerful enforcements devices; more severe and,

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<sup>221</sup> Wolf, in Pennock and Chapman (Eds.), n. 21 at p. 274.

<sup>222</sup> Fisse, n. 162 at p. 373

<sup>223</sup> Fisse, n. 162 at p. 374

<sup>224</sup> Fisse, n. 162 at p. 375.

<sup>225</sup> Fisse, n. 162 at p. 376.

<sup>226</sup> Fisse, n. 162 at pp. 375-6.

<sup>227</sup> Vaughan, n. 12 at p. 73.

<sup>228</sup> Khanna 'Corporate Criminal Liability: What Purpose Does It Serve?' 1996 109 Harvard Law Review 1477-1534 at p. 1492.

arguably, unique sanctions (such as stigma); and a greater message- sending role than corporate civil liability.<sup>229</sup> Elsewhere in this thesis, I have criticised the evident desire of many commentators to downgrade the seriousness of the corporate criminality and their spurious attempts to substitute civil sanction for criminal sanction. The procedural standards which the criminal law insists upon are meant to be exacting; liability should not be easily attached to the corporation. Where there are problems we should work to solve them rather than subvert them.

In any enterprise liability scheme, punishment hopes to be catalytic as well as inhibitory; at present corporations need to do more than simply engage in self restraint or exert inhibition as individuals need do.<sup>230</sup> The law should seek to catalyse compliance policies and disciplinary controls as well as modify standard operating procedures.<sup>231</sup> The mere threat of the imposition of corporate liability may achieve that catalytic conversion. If it does not enterprise liability remains nevertheless necessary as a means of imposing changes directly.<sup>232</sup> In stark contrast to rampant individualism, there is nothing imperialist in the strategy of those who argue for enterprise liability. In adopting such liability wholesale, we do nothing to preclude the retention of individual liability.

### **Collectivism And Corporate Reality**

In developing corporate criminal liability there is a clear need to develop an organizational understanding.<sup>233</sup> Organisational theory helps us understand the tools available to management to control subordinates and also how the organisation affects the behaviour of the individual.<sup>234</sup> There is a need to ensure congruity of sanction and the organisational dynamics and decision-making processes. Only in understanding how and why they operate can we hope to develop a system of liability which can be influential upon them. March and

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<sup>229</sup> Khanna, n. 228 at p. 1492

<sup>230</sup> Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault And Sanctions' 1982 56 South Californian L. R. 1141 at p.1160.

<sup>231</sup> Fisse, n. 230 at p. 1162.

<sup>232</sup> Fisse, n. 230 at p. 1164.

<sup>233</sup> Kramer, in Wickman and Dailey (Eds.), *White Collar And Economic Crime* (1982) at p. 80.

<sup>234</sup> B. D. Baysinger, n. 194 at p. 346.

Simon in their study of corporations basically found that corporations were controlled by elites who determined the premises of decision-making and setting priorities for the organisation and subordinates.<sup>235</sup> Workers exercise limited power over corporations.<sup>236</sup> Drucker argues that corporations discourage individual initiative and engineer conformity.<sup>237</sup> Meier similarly suggests that individuals can be socialised into the corporate ethos.<sup>238</sup> Weber had earlier argued that the very nature of a bureaucracy is to make the individual dispensable.<sup>239</sup> Socialization of employees may be both structural and cultural.<sup>240</sup> None of this should be of any surprise; it is trite to suggest that 'man is so essentially an associative animal that his nature is largely determined by the relationships thus formed.'<sup>241</sup> The pressure on subordinates may be immense. So much so that the corporation can be viewed as 'dynamic system of interacting processes, with an internal "life" that can exert a dramatic influence on its personnel.'<sup>242</sup> Clinard and Yeager point out that the goals set for subordinates may be 'perceived as absolute requirements that may justify almost any means to fulfil them.'<sup>243</sup> Hills poses the question as to how men ordinarily humane and decent in their own family setting can in the corporate context commit crimes of inhumane consequences.<sup>244</sup> The answer does not lie in 'the pathology of evil individuals but in the culture and structure of large-scale bureaucratic organizations within a particular political economy.' Meier suggests that 'If operative goals take on the qualities of normative requirements for organisational behaviour, and if these norms conflict with those of the legal order, then corporate crime may be indigenous to organizational processes.'<sup>245</sup> If that is so, the case for purely individual liability is done some violence.

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<sup>235</sup> March and Simon (1958) referred to in Clinard and Yeager, n. 9 at p. 63

<sup>236</sup> Drucker, *The Concept Of The Corporation* (1964) at pp. 42-3.

<sup>237</sup> Drucker, n. 236 at p. 40.

<sup>238</sup> Meir, 1975 at p. 10 quoted in Clinard and Yeager, n. 9 at p. 66

<sup>239</sup> Quoted in Clinard and Yeager, n. 9 at p. 65.

<sup>240</sup> Clinard and Yeager, n. 9 at p. 66.

<sup>241</sup> H. J. Laski, 'The Personality Of Associations' 1916 29 Harvard L. R. 404-26.; Gordon, n. 1 at p. 6

<sup>242</sup> Note, n. 35 at p. 355.

<sup>243</sup> Clinard and Yeager, n. 9 at p. 45. The quest for profit may put pressure on managers according to Walton and Cleveland, n. 97 at p. 73.

<sup>244</sup> Hills, n. 19 at p. 190.

<sup>245</sup> Meir, n. 238 at p. 10.

Indictment of the distinct lack of ethical considerations in corporate decision-making inherent in many companies is advanced by Gioia who claims,

‘ethical dimensions are not usually a central feature of the cognitive structures that drive decision-making. Obviously, they should be, but it would take substantial concentration on the ethical dimension of the corporate culture, as well as overt attempts to emphasize ethics in education, training, and decision making before typical organizational scripts are likely to be modified to include the crucial ethical component.’<sup>246</sup>

Anderson suggests that the economic pressures within the corporation may lead individuals to take risks on the corporation’s behalf.<sup>247</sup> Stone posits that when individuals are placed in an organisational structure some of the internalised restraints seem to lose their hold.<sup>248</sup> There are various reasons why individuals succumb to group pressure to conform- exposure to beliefs of a peer group, immersion in a similar environment both in and out of work, compliance with standardised qualifications for membership, self sacrifice for group aims, relaxation of critical faculties in expectation of collective acuity, absorption of attitudes and subjection of common constraints as a matter of discipline.<sup>249</sup> Economic goals of the organisation drive out social goals of both the organisation and individuals within it.<sup>250</sup> An organisation’s internal control system can subtly shape an individual’s opportunities so that organisational crimes are committed virtually out of necessity.<sup>251</sup> Naturally there are exceptions to this general proposition; lawbreakers may have own goals and may not be under corporate pressure.<sup>252</sup> The moral dilemma that confronts individuals when corporate pressure is brought to bear to violate the law may be great.<sup>253</sup> They may try to evade feelings of shame or guilt by rationalising their conduct. Hills explains,

‘There are many justifications and rationalisations that enable corporate functionaries to accomplish this social- psychological task and avoid any

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<sup>246</sup> Gioia in Ermann and Lundman (Eds.), n. 63 at p. 155.

<sup>247</sup> Anderson, n. 159 at p. 408.

<sup>248</sup> Stone, op cit. n. 216 at p. 35

<sup>249</sup> Fisse, n. 162 at p. 376.

<sup>250</sup> Fisse, n. 162 at p. 359.

<sup>251</sup> Baysinger, op cit. n. 194 at p. 360.

<sup>252</sup> See Baysinger, n. 194 at pp. 347-8; Geis and Dimento in Pearce and Snider (Eds.), n. 5 at p. 79.

<sup>253</sup> Hills, n. 19 at p. 193-4; The inherent ethics of individual employees and the pressures they face are recounted in the experience of Kermit Vandivier, an airline brake engineer see Heilbroner et al., *In The Name Of Profit* (1972) at p. 17 et. seq.

definition of themselves as criminal. Indeed the very availability of these shared “vocabularies of rationalization” already existing within the corporate occupational culture is precisely what permits many managers to violate the law without any great burden of guilt or threat to their self-respect.<sup>254</sup>

Often employees don’t tell superiors for fear of disciplinary action.<sup>255</sup> Even where the employee voices concern about what they are expected to do their concerns are simply swept aside.<sup>256</sup> Clinard suggests that managers would prefer to work in environments where they are not pressurised to violate legal standards and that influencing the executive elite will set the moral tone for the rest of the organisation.<sup>257</sup> Jackall offers some real politick by suggesting one must make moral accommodations in organisations to get one’s way.<sup>258</sup> Vaughan claims that,

‘to describe properly the behaviour- lawful or unlawful- of organizations ..we need an explanation that goes beyond the goals and actions of the organisations and the goals and actions of its members. This necessity draws attention to the internal processes of organizations and to the normative environment of results.’<sup>259</sup> ....”Organizational processes..create an internal moral and intellectual world in which the individual identifies with the organization and the organization’s goals. The survival of the one becomes linked to the other, and a normative environment evolves that, given difficulty in attaining scarce resources, encourages illegal behaviour to attain them.’<sup>260</sup>

There must be ‘recognition that organisational responsibility has both group and individual facets. Where UK principles have been lacking in sophistication is in their failure to comprehend the complexities of organisational attitudes and practices.’<sup>261</sup> Many commentators support the imposition of corporate criminal liability on the basis that it is the corporate form which creates the climate for individual wrongdoing within the corporate form.<sup>262</sup> Such an approach defeats the view ‘while men do not make their own history under circumstances chosen by

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<sup>254</sup> Hills, n. 19 at p. 194

<sup>255</sup> See Hills, n. 19 at p. 16.

<sup>256</sup> See Westin, *Whistle Blowing: Loyalty And Dissent In The Corporation* (1981), an account of GM by John De Lorean.

<sup>257</sup> See Cullen et al., n. 61 at pp. 350-1.

<sup>258</sup> Jackall, in Ermann and Lundman (Eds.), n. 63 at p. 63.

<sup>259</sup> Vaughan, n. 12 at pp. 68-9.

<sup>260</sup> Vaughan, n. 12 at p. 70.

<sup>261</sup> Wells, n.120 at p. 19.

<sup>262</sup> See for example Baysinger, n. 194 at pp. 353-4.



themselves ...they do nonetheless make it.<sup>263</sup> Speaking of individual managers and officers, Winn claims that 'Mutually stimulated they will go to excesses which alone they would have shrunk. It is inexplicable but plainly demonstrable phenomenon of the human mind that men do not think their own thoughts when in groups; each mind contributes something to the group, and is influenced by the thought impulses which are in play around it.'<sup>264</sup> Westin also argues that 'explaining corporate misconduct in terms of the personal morality or immorality of individual corporate managers represents a limited perspective..The real problem has been the frame of reference for business decisions and the reward structure of companies.'<sup>265</sup> Hills likewise argues 'In the hierarchical labyrinth of specialised tasks and segmented organizational units, employees can easily evade any sense of personal responsibility for the ultimate consequences of their actions.'<sup>266</sup> Whilst believing that socialisation in the corporate form can have detrimental effects on certain individuals it is important to offer some balance as Cullen et al. do when they criticises 'an over -socialized conception of the corporate manager- the notion that the criminogenic conditions of organizational life turn even the most moral individuals into profit seeking sociopaths.'<sup>267</sup> However, identifying the system as responsible also identifies the need for reform therein.<sup>268</sup> It is in that simple recognition that we find the case for enterprise liability overwhelming. Enterprise liability can most readily be defended on the unity of the whole. Without diminishing the contribution of individuals within the organisation, it is also necessary to recognise that

'corporate policies and acts are often the results of more than a simple aggregation of individual choices. Frequently, corporate behaviour depends on a complex interplay among individual choices, standard procedures, and the organisational structure itself. Consequently, corporate policies and acts should be attributed to the corporate structure as a whole and considered as conceptually independent from the intents of the individuals within the corporation...The law should consider the corporate structure as an intentional agent in and of itself....a corporation should be considered neither a 'black box' nor a mere aggregation of

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<sup>263</sup> Marx quoted in Carson, *The Other Price Of Britain's Oil*, (1982), at p. 12.

<sup>264</sup> Winn, 'The Criminal Responsibility Of Criminals' 1929 3 Cambridge L. J. 398-415 at p. 406.

<sup>265</sup> Westin, n. 256 at p. 137.

<sup>266</sup> Hills, n. 19 at p. 194.

<sup>267</sup> Cullen et al., n. 61 at p. 350.

<sup>268</sup> Foerschler, n. 177 at p. 1290.

individuals. Instead the subjects of inquiry should be the corporation's internal structure and decision-making processes.<sup>269</sup>

### 3.4 Individualism And The American Approach

It is America that one finds the clearest illustration of the co-existence of enterprise and individual liability. The fact that corporate criminal liability has its strongest roots on that continent has not diminished the pursuit of individualistic liability. In America there are a number of cases where the courts have been prepared to infer actual knowledge on the part of corporate officers or directors based on their actings.<sup>270</sup> This inference may derive from mere acquiescence.<sup>271</sup> It has been said that,

‘Outside the context of a corporation, the law has been reluctant to impose criminal liability for knowing of a crime and failing to prevent it. But when a corporate official knows that subordinates within his realm of authority are engaged in illegal activity, his toleration of the conduct is more than a failure to act. By not controlling his subordinates, the official knowingly permits his authority to be used in the commission of a crime.’<sup>272</sup>

It seems to be the case that an officer will incur personal liability if he retains a responsible relation to the situation even though he may not have participated personally.<sup>273</sup> The rationale for such an approach is supported in the Supreme Court's statement in *US v Park* where they said ‘The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the

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<sup>269</sup> Foerschler, n. 177 at p. 1303.

<sup>270</sup> See Spiegelhoff, n. 52 at pp. 607-610; *US v Laffal* 83 A 2d 871 (1951); *Raleigh v US* 351 A 2d 510(DC Cir 1976).

<sup>271</sup> See *State ex rel Kropp v Gilbert* 213 Wis 196,251 N W 478 (1933). The Electric cases in USA in the late 1950s and 1960s resulted in jail sentences imposed on 7 corporate executives for violation of the Sherman Act for price fixing (see Walton and Cleveland, n. 97). Cases where individuals have not been able to hide behind the corporate form in USA *People v Carter* 200 AD 413,193 NYS 16 (1922); *People v Klinger* 164 Misc. 530,300 NYS 408(Magis Ct 19937); *State v Cooley* 141 Tenn 33,206 SW 182 (1918); *State v Thomas* 123 Wash 299,212 P 253 (1923); *State v Milbraith* 138 Wis 354, 120 NW 252(1909).

<sup>272</sup> *Developments*, n. 40 at p 1268.

<sup>273</sup> *US v Park* 421 US 6588 (1975) op cit. at p. 655.

public that supports them.<sup>274</sup> In *US v Park* the court held that causation was not shown by wrongful conduct but rather by responsibility within the corporation for the act. It was not necessary for the prosecution to prove that the corporate officer had direct supervisory responsibility over those immediately responsible for the prohibited act.<sup>275</sup> In *US V Andreadis* there is support for the proposition that a corporate manager may be criminally liable for an intentional crime by failing to fulfil an affirmative duty to supervise. However, the force of the *Andreadis* decision is weakened by the fact that there have been no convictions for omissions. Can acquiescence result in liability for crime? Schaff suggests that in America there is authority for the proposition that courts are willing to infer actual knowledge.<sup>276</sup> However, such a doctrine may be limited to the smaller enterprise where the entrepreneur is very much in control of the organisation and the bureaucracy is not over-developed. What about liability for omissions in the absence of a positive duties ? Schaff argues that the *Andreadis* decision is diminished by the 'failure of any court to impose criminal liability on an individual corporate defendant for an omission of duty.'<sup>277</sup>

In America, Federal law bases individual liability on participation, actual or constructive knowledge and failure to control corporate misconduct.<sup>278</sup> The key cases are those of *Dotterwiech* and *Park*. *Dotterwiech* lays down a standard of a 'responsible share in the furtherance of the transaction'. In respect of *mens rea* offences the Federal courts seemingly require some affirmative act, participation authorisation or acquiescence before imposing individual liability.<sup>279</sup> In *US V Wise*<sup>280</sup> 'responsible share' was restricted to those who actively promoted and participated in effecting the illegality. Goodwin suggests that,

'The authority of executive officials to devise measures necessary to insure corporate compliance with regulatory statutes and their failure to

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<sup>274</sup> *US v Park supra* at p. 672.

<sup>275</sup> *Spiegelhoff*, n. 52 at p. 615.

<sup>276</sup> Schaff, n. 113 at p. 144.

<sup>277</sup> Schaff, n. 113 at p. 146.

<sup>278</sup> Goodwin, n. 168 at p. 977.

<sup>279</sup> Goodwin, n. 168 at p. 983.

<sup>280</sup> 370 US 405 (1962)

implement adequate safeguards are further grounds for establishing a 'responsible share' in corporate violations of the law.'<sup>281</sup>

*US v Park* modified *Dotterwiech* to the extent that it determined that the corporate officer's position was not the determining feature of his liability. Goodwin argues that *US v Park* suggests that *Dotterwiech*'s applicability may be limited to strict liability statutes where specific duties are imposed. According to Braithwaite, the decision is objectionable on the basis that it punishes persons without knowledge but its strength is that it punishes those that can make a difference.

The Proposed Federal Criminal Code suggested the following approach to individual liability within the corporation:-

*Section 403(a) - 'A person is criminally liable for an offense based upon conduct that he engages in or causes in the name of an organisation or on behalf of an organisation to the same extent as if he engaged in or caused the conduct in his own name or on his own behalf.'*

*Section 403(b) - 'Except as otherwise expressly provided, whenever a duty to act is imposed upon an organization by a statute, or by a regulation, rule, or order issued pursuant thereto, an agent of the organisation having significant responsibility for the subject matter to which the duty relates is criminally liable for an offense based upon an omission to perform the duty, if he has the state of mind required for the commission of the offense, to the same extent as if the duty was imposed upon him directly'.*

*Section 403(c) - 'A person responsible for supervising particular activities on behalf of an organisation who, by his reckless failure to supervise adequately those activities, permits or contributes to the commission of an offense by the organization is criminally liable for the offense, except that if the offense committed by the organization is a felony the person is liable under this subsection only for a class A misdemeanour.'*

One of the key features of the study draft of the proposed Federal Criminal Code was the imposition of the duty on corporate officers to allocate responsibility for compliance as well as the normal supervisory and managerial duties. Leigh believes this to be difficult unless 'rigid management structures were required by corporate law.' Goodwin argues that the individual defendant should be allowed to present evidence of his inability to effect corporate changes or to fully control all

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<sup>281</sup> Goodwin, n. 168 at p. 988

corporate activity.<sup>282</sup> In Texas liability is singularly attributed to the individual. In *Guild v State*<sup>283</sup> it was said 'It is the general principle of law in this State that the person who actually commits a crime shall be punished therefor, whether he be acting on his own initiative or is an agent for a principal...in order to enforce the law, it is essential that the agent who commits the crime shall be punished therefor instead of his principal, a corporation.'<sup>284</sup> Generally, courts throughout America have shown a greater predilection to jail corporate offenders.<sup>285</sup> It is evident from analysis of American jurisprudence that the pursuit of corporate liability need not deflect from individual liability. In developing our own model this point may be singularly reassuring. Indeed in some respects it answers the question with which this chapter concludes.

### 3.5 Can Corporate And Individual Liability Co-Exist?

So far debate has centred around two alternative forms of criminal liability-individual or enterprise (or 'non-reductionist'). The potency of that debate and the seemingly irreconcilable standpoints of various academic commentators should not be allowed to obscure the fact that there exists a rich body of literature that suggests the two may mutually co-exist and indeed the combination of individual and collective liability represent the best way to tackle corporate crime. It has been said that 'in the eyes of many, corporate criminal liability is a dubious development which could and should have been avoided by suitably adapting and enforcing the existing individual criminal law. Enduring as this dubiety has been, there are many reasons for the coexistence of corporate and individual criminal liability. Once those reasons are understood, the idea of a single-minded commitment to individual criminal liability seems short-sighted and forlorn. A dual focus is needed, for such is the individualistic and corporate duality of the modern world of crime.'<sup>286</sup> It seems we can 'hedge our theoretical bets.'<sup>287</sup>

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<sup>282</sup> Goodwin, n. 168 at p. 1010.

<sup>283</sup> 79 Tex Crim 603, 187 SW 215 (1916)

<sup>284</sup> Quoted in Hamilton, n. 56 at p. 62., see also *Overt v State* 97 Tex Crim 202, 209 (1924).

<sup>285</sup> E.g. *US v McDonough Co.* 1959 Trad Cas 75882 (SD Ohio); *US v Westinghouse Elec Corp.* 1960 Trade Cas 76753 (E D Pa); discussed in Ball and Friedman n. 61 at p. 197ff.

<sup>286</sup> Spiegelhoff, n. 52 at p 622

<sup>287</sup> Fisse, n. 18 at p. 492.



Spiegelhoff talks of 'A new zeal' emerging 'for penetrating the multiple layers of hierarchy to hold not only the corporation, but also high level corporate managers, responsible for crimes committed on behalf of the corporation.'<sup>288</sup> Stone argues that neither enterprise liability nor individual liability 'is adequate to produce the desired behaviour-modifying correction in all circumstances.'<sup>289</sup> There is an argument that posits that 'Liability should be cumulative, not substitutory.'<sup>290</sup> Another contribution argues corporate and individual liability are complimentary not mutually exclusive<sup>291</sup> and that 'Emphasizing corporate liability does not necessarily preclude all individual liability.'<sup>292</sup>

Fisse lists nine reasons for the co-existence of individual liability and corporate liability- organisational secrecy, number of suspects, corporate profit motive, expandability of personnel, personnel beyond jurisdiction, offences defined by reference to corporate status, corporate negligence, corporate intentionally and surrogate liability.<sup>293</sup> In respect of the first he says,

'Corporate criminal liability works to minimize the problem of Organizational secrecy in several ways. First, punishing a corporation may lead to a reduction in the intracorporate prestige of individual personnel to blame. Second, a corporation may be prompted to initiate internal disciplinary prodding and impose its own formal sanctions. Third, precautionary measures, including improved training and supervision, may be induced through fear of sanctions being imposed upon the enterprise should further offenses be committed.'<sup>294</sup>

Another concern for Fisse is the transference of enforcement resources needed to target individuals 'the overall effect is likely to be a relaxation of the social control of corporate crime.'<sup>295</sup> Indeed his concern goes a little further;

'Even if there were enough enforcement resources to implement a crime control strategy of Individualism, it would not follow that those resources

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<sup>288</sup> Spiegelhoff, n. 52 at p. 604.

<sup>289</sup> Fisse and Braithwaite, n. 18 at p. 36.

<sup>290</sup> Leigh, n. 3 at p. 1526.

<sup>291</sup> *Developments*, n. 40 op cit. at p. 1372

<sup>292</sup> *Developments*, n. 40 at p. 1373.

<sup>293</sup> Fisse op cit. in Hochstedler (Ed.), *Corporations As Criminals* (1984) at pp 69-70.

<sup>294</sup> Fisse, n. 293, at p. 71.

<sup>295</sup> Fisse, n. 18 at p. 498.

should be used exclusively in the pursuit of individual criminal liability. The potential gain would be a minimal increase in the numbers of individuals brought to justice at the expense of losing the indirect but multiple sanctioning effects of corporate liability'....'A more commendable approach is to adopt a mixed strategy, retaining corporate as well as individual liability, and improving the capacity of corporate liability to achieve accountability at the level of internal discipline.'<sup>296</sup>

Reliance solely on individual criminal liability it would seem is beset with problems. Coffee nevertheless recognises that 'the case for such an individual focus to corporate law enforcement is strong but it is not unqualified..enforcement officials cannot afford to ignore either the individual or the firm in choosing their targets, but can realize important economies of scale by simultaneously pursuing both.'<sup>297</sup> One of the problems of individual liability is that,

'To criminalize behaviour that is essentially beyond the actor's control undermines the moral basis of the entire criminal justice system. Even at this higher price, we are more likely to realize only a marginal diminution in misconduct, for the more the conduct is unpremeditated, or is a joint product of many agents' acts over which the targeted agent has limited control, the more inelastic its "supply" will be to changes in expected penalty levels.'<sup>298</sup>

There is a need for fair attribution of criminal liability. French argues that 'if the act is genuinely the result of individual actions taken by the appropriate people in accord with the established procedures of the company, then the culprit will truly be said to be the corporation, and it will be the corporation not because the CEO says it is, but because the criteria for the incorporation of individual actions have been satisfied.'<sup>299</sup> That sense of fairness is also implicit in Wilson and Braithwaite's comment that 'we need a notion of group responsibility as well as a notion of individual responsibility, and there must be a dialectical interplay between the two.'<sup>300</sup> One idea floated by Leigh is to create overlap in the legal system so that the natural person could be convicted of a crime, while the

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<sup>296</sup> Fisse, n. 18 at p. 499.

<sup>297</sup> Coffee, 'No Soul To Damn, No Body to Kick: An Unscandalised Inquiry Into The Problem Of Corporate Punishment' 1981 79 Michigan L. R. 386-459 at p. 387.

<sup>298</sup> Stone, n. 216 at p.32.

<sup>299</sup> P. French, *Collective And Corporate Responsibility*, (1979) at p. 55.

<sup>300</sup> Wilson and Braithwaite, n. 6 at p. 249.

corporation is held liable only for an administrative offense.<sup>301</sup> However, I have already counselled against a differential approach.

Fisse and Braithwaite reject putting all the eggs in the basket of pursuing individual offenders on three bases- the capacity of organisations to cover up internal accountability; the collectivist nature of corporate decision making; the inegalitarian bias of trying to put all the effort into prosecuting individuals.<sup>302</sup> The argument is that by pursuing the corporation, it is more likely to achieve individual accountability; the activation of private justice systems within corporations are likely to be more effective.<sup>303</sup> Fisse and Braithwaite have declared that 'individuals have individual responsibilities for corporate crime and that collectivities have collective responsibilities for corporate crime.'<sup>304</sup> Both messages might well be conveyed by imposing corporate liability mostly through public enforcement and individual responsibility mostly through private justice systems.<sup>305</sup> Kraakman also supports 'a dual liability regime that joins absolute personal liability with enterprise liability [which] offers two sanctioning tools, each providing a different marginal deterrent. Together, they may provide far more effective deterrence than comparable levels of either could alone.'<sup>306</sup> The agency notion of corporate affairs should dictate dual liability of individuals and the corporate entity but as Kraakman explains

'in practice much of this dual structure collapses..regardless of the dictates of formal doctrine, the actual distribution of legal risks more closely approximates to a unitary regime of enterprise liability than a dual regime of firm and personal liability. The corporation typically bears the brunt of tort damages or criminal penalties arising out of the activities of its agents or employees.'<sup>307</sup>

Walt and Laufer argue that individuals and corporations should be liable to the same mix of sanctions and that corporate and individual penalties should be

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<sup>301</sup> Leigh, n. 3 at pp. 1526-7.

<sup>302</sup> Findlay and Hogg (Eds.), n. 28 at p. 105.

<sup>303</sup> This view is supported by the Law Reform Commission of Canada see n. 200 at p. 31

<sup>304</sup> Fisse and Braithwaite in Findlay and Hogg (Eds.), n. 28, at p. 118.

<sup>305</sup> Fisse and Braithwaite in Findlay and Hogg (Eds.), n. 28, at p. 118

<sup>306</sup> Kraakman., 'Corporate Liability Strategies And The Costs Of Legal Controls' 1969 93 Yale Law Journal 857-98 at p. 880.

<sup>307</sup> Kraakman, n. 306 at p. 859.

complementary.<sup>308</sup> A key question is how individual and corporate sentencing should be co-ordinated.<sup>309</sup> Edgerton recognises the duality argument in saying that 'Whatever social purpose...tends to be served by punishing or threatening to punish the individual who does a given act, tends also to be served by punishing or threatening to punish the corporation in the course of whose business he does it.'<sup>310</sup> Goodwin has argued that the proper allocation of criminal responsibility between the corporation and its individual agents has proven to be an elusive goal.<sup>311</sup> If that is the case, there is every reason for us to redouble our efforts to promote a balanced system which directly hits the appropriate target. As Fisse and Braithwaite contend 'the challenge ahead is to devise an approach which as a matter of law reflects the commonplace principle that everyone responsible in some way for an offence should be held responsible accordingly.'<sup>312</sup> A strategy based on individualism alone represents simplistic targeting.<sup>313</sup> It cannot be expected to provide an adequate approach to the prevention of corporate crime but nor can individual liability be ignored because of the individual agency in the commission of corporate crime.<sup>314</sup> The lesson from Anglo-American jurisprudence is clear-individualism and corporatism can sensibly co-exist within the confines of one system. More importantly, if we are serious about tackling corporate crime then they must.

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<sup>308</sup> Walt and Laufer, 'Why Personhood Doesn't Matter: Corporate Criminal Liability And Sanctions' 1991 18 American Journal of Criminal Law 263-287 at p. 278.

<sup>309</sup> J. S. Parker, 'Criminal Sentencing Policy for Organisations' 1989 26 American Criminal L. R. 513 at p. 525.

<sup>310</sup> Edgerton, n. 176 at p. 832.

<sup>311</sup> Goodwin, n. 168 at p. 967.

<sup>312</sup> Fisse and Braithwaite, n. 18 at p. 99

<sup>313</sup> Fisse and Braithwaite, n. 18 at p. 57

<sup>314</sup> Gruner *Corporate Crime And Sentencing* (1994) at p. 14; Fisse, 'Responsibility Prevention And Corporate Crime' 1973 5 New Zealand Law Review 250-279 at p. 260

## CHAPTER 4

### PUNISHING THE CORPORATE CRIMINAL

#### 4.0 Introduction

As Slapper notes no sooner do we confront the criminological issues in corporate crime than we face the penological ones.<sup>1</sup> There is an obvious and inherent difficulty in punishing inanimate objects by means ordinarily applied to individual human actors. Moreover, because organisations have different interests and objectives from individuals sentencing corporations presents distinct problems.<sup>2</sup> Whether we can develop proper sentencing strategy to counteract endemic corporate delinquency is undoubtedly a question to be addressed.<sup>3</sup> Fisse and French detect 3 general developments in modern sentencing of corporations in Anglo-American jurisprudence- a non interventionist sanctions bias; unsupported assessments of quantum of sentence, and a mindset against development of full range of sanctions.<sup>4</sup> Goff and Reasons are equally pessimistic claiming that, so far, the sentencing of corporations provides little encouragement in terms of deterrent, symbolic and retributive effects of criminal law.<sup>5</sup> Because corporations appear beyond the control of current legal sanctions<sup>6</sup> simply deploying existing sentencing mechanisms may be unnecessarily restrictive. Arguably, there has been insufficient attention to non-legal forms of control of corporate crime.<sup>7</sup> Indeed our whole approach suffers from inherent limitations. Seney claims we operate on a nuisance theory whereby we balance the benefits on the continued functioning of the corporation against the harm done,

‘We don’t close down the corporation and remove all functions from society. We either fine it- asking it to operate for X hours to pretend to pay the social debt and thus compensate the public- or, in exceptional cases, we send a few minor officers to jail while the corporation

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<sup>1</sup> G. Slapper, ‘*Corporate Punishment*’ 1994 144 New L. J. 29-30 at p. 30.

<sup>2</sup> J. S. Parker, ‘*Criminal Sentencing Policy For Organisations*’ 1989 26 American Criminal L. R. 513 at p. 515.

<sup>3</sup> Note, ‘*Structural Crime And Institutional Rehabilitation*’ 1979 89 Yale L. J. 353-375 at p. 354; Slapper, ‘*Corporations Crime And Punishment*’ 1994 Business Law Review 126-128 at p. 128

<sup>4</sup> Fisse and French (Eds.), *Corrigible Corporations And Unruly Law*, (1985), at p. 203.

<sup>5</sup> C. H. Goff and C. E. Reasons, *Corporate Crime In Canada*, (1978) at p. 123.

<sup>6</sup> F. T. Cullen and P. J. Dubeck, ‘*The Myth Of Corporate Immunity To Deterrence: Ideology And The Creation Of The Invincible Criminal*’ 1985 49 Federal Probation 3 at p. 3; see also Stone, *Where The Law Ends: The Social Control Of Corporate Behaviour*, (1975).

<sup>7</sup> Braithwaite, *Corporate Crime In The Pharmaceutical Industry*, (1984), at p. 292.



continues operation. When an individual commits a crime we label the entire person criminal and suspend all his social functions by removing him entirely from society.’<sup>8</sup>

Several uniquely organisational factors may also be relevant in the context of punishment. First, the size of the corporation may be significant. Elkins points out that whilst the size of the corporation may help to shield the individual offender there is a corresponding focusing of public attention on the larger corporations.<sup>9</sup> Moreover, the impact of a finding of guilt may have greater impact on the larger organization than on the smaller less well known entity. Conversely, the importance of the removal of illegally gained profits is especially important in smaller corporations where there may be proximity between the owners and the directors.<sup>10</sup>

Another issue which presents itself in modern day corporate life is the distinction between public and private corporations. Of course, such distinctions are no longer well-defined.<sup>11</sup> The private/public differential might be explained by reference in the different organisational goals. Stone explains one of the consequence of this as being ‘A different quality or depth of indignation might be aroused by the company that hazards health ‘for profit’ than by the public laboratory that does so in the pursuit of science and whose successes would be rateably shared among the whole population, rather than a group of investors.’ Stone himself challenges this particular sentiment. Public authorities may be equally blameworthy and reprehensible. Is it fair that their sanction should be any the less because they are public entities ?<sup>12</sup>

A further problem ensues from the complex organisational and financial devices which companies deploy. Parent companies and group formation are now common

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<sup>8</sup> Seney, ‘*The Sibyl At Cumae - Our Criminal Law's Moral Obsolescence*’ 1971 17 Wayne L. R. 777-858 at p. 844.

<sup>9</sup> J. R. Elkins, ‘*Corporations And The Criminal Law*’ 1976 65 Kentucky L. J. 73-129 at p. 80.

<sup>10</sup> See Forte, ‘*Single Member Private Limited Companies: Harmonisation And Rationalisation*’ 1992 2 SLT 377-379 for new European proposals to allow single member companies.

<sup>11</sup> C. D. Stone, ‘*Corporate Vices And Corporate Virtues: Do Public/Private Distinctions Matter?*’ 1982 1390 University of Pennsylvania L. R. 1441-1509 at p. 1447.

<sup>12</sup> Stone, n. 11 at p. 1463.

place. Applying sanctions to a subsidiary also has problems particularly where its assets might be significantly less than the punishment thought suitable.<sup>13</sup> One possible solution may be to hold the parent company and the subsidiary to be a solitary entity.<sup>14</sup> However 'In doing so the court will be actively intervening in the corporate relations of the firm and thereby restricting the scope of limited liability that a shareholder usually enjoys.'<sup>15</sup> There are, it is submitted, substantial public policy reasons why, in this instance, the concept of limited liability rule should be circumvented.

Recognition that greater responsibility to society must accompany the awesome power that corporations have amassed, has prompted a body of literature calling for punishment of the corporate offender.<sup>16</sup> One reason for dissatisfaction is the perceived failure of corporations themselves, to self-regulate their behaviour.<sup>17</sup> Implicit in the promotion of corporate criminal liability is generally promotion of the notion of corporate social responsibility.<sup>18</sup> Donaldson has proposed that there be a contractual relationship between business and the community that creates responsibility.<sup>19</sup> Certainly, as a basic premise, it seems reasonable to expect a company to devote resources to prevention of harm<sup>20</sup> but, real corporate social responsibility undoubtedly requires much more. According to Stone, there are two wings to the corporate social responsibility movement- voluntarist and interventionist; the latter wants the law to nudge corporations towards greater social responsibility whereas voluntarism entails the corporation undertaking

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<sup>13</sup> See P. Muchlinski, 'The Bhopal Case: Controlling Ultra Hazardous Industrial Activities Undertaken By Foreign Investors' 1987 50 Modern L. R. 545-587 at p. 568.

<sup>14</sup> Muchlinski, n. 13 at p. 573.

<sup>15</sup> Muchlinski, n. 13 at p. 581.

<sup>16</sup> M. Clinard, *Corporate Corruption: The Abuse Of Power*, (1990), at p. 186; Henning in R. Nader and M. Green, *Corporate Power In America*, (1973), at p. 170

<sup>17</sup> H. M. Freidman, 'Some Reflections On The Corporation As Criminal Defendant' 1979 55 Notre Dame Lawyer 173-202 at p. 178.

<sup>18</sup> M. Clinard and P. Yeager, *Corporate Crime*, (1980), at p. 207.

<sup>19</sup> T. Donaldson, *Corporations And Morality*, (1982) at p. 42; Grygier attempts to develop the reasonable man test into the corporate responsibility concept. In his scheme the standards of reasonable behaviour are flexible and depending on time, place, the functions of the corporation, and other factors T. Grygier, 'Corporate Crime: Legal And Administrative Sanctions' 1992 4 Eurocriminology at p. 23 op cit.

<sup>20</sup> E. Colvin, 'Corporate Personality And Criminal Liability' 1995 6 Criminal Law Forum 25.

reforms on the basis of perceived self-advantage or an intuitive appeal to altruism.<sup>21</sup> Stone offers the view that,

‘What is missing in our corporate/social relations today, and needs to be restored, is a measure of mutual trust and respect. As things stand, we are settling into to a self defeating cycle in which the anti-corporate sentiment is increasingly shrill and ill-informed, and the corporate response is too often self defensive, unheeding and unconstructive. In these circumstances, some systematic integration of the ‘inside’ with the ‘outside’, some further exhortation of corporate social responsibility could lead- and may be the only way to lead- to new, more productive patterns of co-operation and growth.’<sup>22</sup>

What Stone appears to neglect is that the relationship between the law and trust is circuitous. Before trust can flow, there must be substantial and sustained observance of the criminal law.

As I have observed in Chapter 1 of this thesis, the concepts of liability and punishment are entwined with moral fault. Morality ‘implies conformity with the generally accepted standards of goodness or rightness in conduct or character.’<sup>23</sup> According to Oleck, morality must be measured by current standards.<sup>24</sup> Sutherland explains that ‘the relation between the law and the *mores* tends to be circular. The *mores* are crystallized in the law, and each act of enforcement of the laws tends to re-enforce the *mores*.’<sup>25</sup> Packer also believes that moral obliquacy should be the determinant for the imposition of criminal sanctions saying that ‘So long as that [community condemnation] sanction is resorted to, moral blameworthiness should

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<sup>21</sup> C. D. Stone in Fisse and French (Eds.), n.4 at p 30

<sup>22</sup> Stone, n. 21 at p. 34.

<sup>23</sup> Oleck, ‘*Remedies For Abuses Of Corporate Status*’ 1973 9 Wake Forest L. R. at p. 474.; Nemerson defines moral fault utilising certain constructs

1 engagement in voluntary act or omission

2 an intended or foreseen aspect of that conduct violates a moral rule

3 the actor believes that there is an unreasonable risk of that aspect exists or that a consequence of the conduct will occur and that either violates the moral rule

4 the actor is not aware that there is an unreasonable risk that either an aspect of the conduct exists or a that a consequence of the conduct will occur but possesses the physical and mental capacities necessary to foresee such a risk

5 the actor knows the moral rule. (see Nemerson, ‘*Criminal Liability Without Fault: A Philosophical Perspective*’ 1975 75 Columbia L. R at p. 1518).

<sup>24</sup> Oleck, n. 23 at p. 474.

<sup>25</sup> E. H. Sutherland, *On Analyzing Crime*, (1973), at p. 77.

be the indisputable condition precedent to its application.<sup>26</sup> Put another way '[t]he punishment of less than immoral behaviour weakens the force of the criminal law.'<sup>27</sup> The liberal paradigm of moral culpability requires that moral actors have some form of knowledge, reason, and control of their actions before they can be blamed for what they have done.<sup>28</sup> Rationality then is central to the issue of morality. So much so that it is argued,

'[I]n the liberal view of morality, reason is privileged...There is also a tendency to regard rationality as value free, universal concept...This view of rationality at the core of human nature is well reflected both in the utilitarian view of persons as rational calculators and somewhat differently, in the Kantian vision of the rational agent..Closely related to the liberal vision of rational persons is the notion of humans as free and responsible agents, capable of understanding and controlling their own actions... for the purpose of model building... a centrally important feature of liberalism [is] the vision of the individual as an autonomous agent capable of choice and control, aware of her environment and, at least in some respects, capable of shaping it to her own ends. Both rationality and the capacity for responsible action are thus for liberalism at once factual features of human nature and sources of normative limits on the ways in which human beings maybe treated, particularly by political and other institutions. These features above all others seem to entail the distinctly liberal focus upon the moral value of freedom.'<sup>29</sup>

According to Aranella there are four aspects to the liberal theory of morality- moral agency; breach of moral norm; fair obligation of agent to comply; breach can be fairly attributed to agent's conduct.<sup>30</sup> A moral agent will not deserve moral blame when the breach occurs under circumstances that deprive him of a fair opportunity to avoid the breach.<sup>31</sup> Arenella articulates a normative, character-based, conception of moral agency claiming, 'Our accounts of moral evil presuppose that the wrongdoer has the capacity for moral concern, judgement and action. We view

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<sup>26</sup> Packer, '*Mens Rea And The Supreme Court*' 1962 Sup Crt Rev 107 at pp. 147-8 quoted in S. S. Nemerson, n. 23 at p. 1517.

<sup>27</sup> Spurgeon and Fagan, '*Criminal Liability For Life-Endangering Corporate Conduct*' 1981 72 Journal of Criminal Law and Criminology 400 at p. 413.

<sup>28</sup> See Arenella, '*Convicting The Morally Blameless: Reassessing The Relationship Between Legal And Moral Accountability*' 1992 39 UCLA L. R. 1511 at p. 1517.

<sup>29</sup> N. Lacey, *State Punishment, Political Principles and Community Values* (1988) at p. 146 quoted in Arenella, n. 28.

<sup>30</sup> Arenella, n. 28 at p. 1518

<sup>31</sup> Arenella, n. 28 at p. 1520

moral evil as a corruption of this moral potential.’<sup>32</sup> Arenella argues that moral agents must possess the following character based abilities and attributes- ‘the capacity to care for the interests of other human beings, the internalization of others normative expectations,.....the capacity to respond to moral norms as a motivation for one’s choices, and the power to manage those firmly entrenched aspects of character that impair one’s ability to make an appropriate moral evaluation of the situation one is in and the choices open to one.’<sup>33</sup>

So far, these precepts of morality are advanced in the context of human beings. To what extent, as general principles, are they applicable to corporations ? Kaplan outlines the extent of our problem in seeking to apply morality to the corporate form by explaining that,

‘In our Judaeo- Christian tradition, we have long been accustomed to viewing morality as essentially a matter of the individual’s obligations and responsibilities...Although only the individual can be a moral agent, most significant action today is performed not by individuals but by collectivities..How moral responsibility is to be assigned to those engaged in collective action remains a real problem.’<sup>34</sup>

Strictly following an agency approach, Lewis formulates the following dilemma.

‘It is a central feature of our moral discourse that we hold individuals morally responsible for those actions and only for those actions for which (1) they were casually (that is non morally) responsible, and (2) which they intended to perform. Suppose that someone wishes to ascribe responsibility to a collective or group for a certain action. Then either this ascription of responsibility employs this term merely in a non-moral sense that a certain group of individuals together caused a certain resulting state of affairs, and their individual moral responsibility must be decided strictly according to the particular actions each individual performed; or this ascription to the collective is used in the moral sense of responsibility, in which we have rendered the ascription of moral responsibility to individuals vacuous or meaningless.’<sup>35</sup>

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<sup>32</sup> Arenella, n. 28 at p. 1609.

<sup>33</sup> Arenella, n. 28 at p. 1609.

<sup>34</sup> Kaplan, *Perspectives On The Theme In Individuality And The New Society*, (1970) at pp. 18-19.

<sup>35</sup> Lewis, ‘*The Non-Moral Notion Of Collective Responsibility*’. quoted in J. Surber, ‘*Individual And Corporate Responsibility: Two Alternative Approaches*’ 1983 2 *Business and Professional Ethics Journal* 67-88.



Such petulant posturing surely misrepresents the true nature of the argument for the ascription of moral responsibility to corporations. Individual morality is not rendered meaningless by collective moral responsibility. Moreover, personhood need not be a precondition of moral agency. French claims that 'the fact that something is a legal person is no grounds for including it among the members of the moral community, and an argument that would defend the proposition that because something is a moral person it must be a legal one fails to grasp the institutionality of the law..moral personhood is a metaphysical matter: legal personality is a matter of institutional rules and may be of a purely practical origin.'<sup>36</sup> In his view, only corporations that have corporate internal decision-making structures (CIDs) can meet the conditions of moral personhood.<sup>37</sup> In contrast, Wolf accepts that organisations policies and actions do express values and goals but he argues that these are properly those of the individuals.<sup>38</sup>

The essence of the moral person contention is that one needs to show that the corporation can exhibit rationality and intention.<sup>39</sup> Donaldson rejects corporate moral agency on the basis of difficulty in establishing the *locus* of intention within the corporation and, on the fact that some things behave intentionally without being moral agents (e.g. animals). To qualify as a moral agent according to Donaldson there is a need to have a process of moral decision-making including the capacity to use moral reasons in decision making and secondly, the capacity of the decision making process to control not only overt corporate acts, but also the structure of policies and rules. In marked contrast Surber explains why there is no conflict between individual morality and collective morality by arguing that,

'we should not lose sight of the fact that the concept of moral responsibility itself is not equivocal when applied to the two [individual and collective moral responsibility]. Just as corporate responsibility must be assessed against the backdrop of the complex set of relationships in which it stands in virtue of the sort of entity it is and in the interests it can affect. So too must the responsibility of the individual. One of the primary deficiencies of the agency approach is to view individual moral responsibility as somehow diminished when

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<sup>36</sup> P. French, *Collective And Corporate Responsibility*, (1979), at p.173.

<sup>37</sup> French, n. 36 at p. 168.

<sup>38</sup> Wolf in Pennock and Chapman (Eds.), *Criminal Justice*, (1985), at p. 280.

<sup>39</sup> Donaldson, n. 19 at p. 21.

the individual acts as a member of a group. It is as if acknowledging that a group rather than an individual is responsible for a certain state of affairs implies that this group responsibility somehow represents a sort of fixed quantum of responsibility that is to be divided among the members of the group. In fact, however, our concept of moral responsibility, once freed from the agency approach, does not function like this at all. Rather, being a member of a conglomerate like a corporation, acting as its agent, and playing a role within its decision-making process constitutes a set of relations in part defining the moral life of the individual. The very status the individual occupies as part of a corporation carries with it a degree of responsibility not only beyond and different from that which the individual would have merely as an abstract agent, but also over and above what the corporation itself may or may not succeed in accomplishing. This is not to deny the relatively limited degrees of influence that an individual may exercise, on a large corporation, but it is also to affirm that individual and corporate moral responsibility cannot exclude one another but must be understood as a broader network of moral relations. It no more exculpates an individual from his moral responsibility as a member of a corporation to claim that it is merely an input-output mechanism for maximising profit and minimizing loss. The responsibility approach affirms that corporate and individual responsibility stand or fall together.<sup>40</sup>

A cursory survey of the literature reveals a polarised view amongst philosophers as to the capacity of corporations to exude morality. Those who believe that corporations cannot be moral agents reject corporate criminal liability. However, French has shown one way to retain the integrity of the nexus between morality and criminality in relation to corporations. Yet again though, we confront the need to be anthropomorphic in our attitude to corporations. We feel compelled to justify the punishment of corporations on the same basis as individuals. Here though the conceptual barriers are not insurmountable as French has shown. Locating the mind of corporation in its policies and practices seems a sensible and logical step. It takes us away from applying fault to the corporation through the mental state of individuals within towards a more intrinsically corporate approach. In accepting collective morality, it is axiomatic that we demand the same standards of morality from corporations as we can from individuals.<sup>41</sup> Even in surmounting the seemingly fundamental problem of morality, we happen upon further policy

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<sup>40</sup> Surber, n. 35 at p. 85.

<sup>41</sup> Donaldson, n. 19 at p. 18.

problems which are unique to corporations. This chapter attempts to identify and analyse the problems which punishing the corporate criminal entails and to suggest a number of alternative possibilities. The limitations of our approach so far can be transcended by not only a pluralist approach punishing both the corporation and the individual wrongdoer within it but, also a system where the options are far more extensive than simply fining the corporation.

#### **4.1 Punishment Of The Corporation And The Problem Of Overspill Of The Sanction**

One of the primary concerns of criminologists, and jurists generally, has been the desire to avoid overspill of the punishment to innocent parties. This is particularly pertinent in respect of corporate crime. Lederman is hugely critical of the imposition of corporate criminal liability both in principle and because it 'imposes the burden of the sanction on individuals whose involvement in the transgression has not been proven and whose sole fault lies in their being part of a group connected to the offender.'<sup>42</sup> Potential recipients undeserving of punishment can be said to include shareholders, employees and fellow corporations.

Different viewpoints emerge as to the true nature of the shareholders' involvement in the corporation. Whilst shareholder control is the orthodox view of the controlling corporations,<sup>43</sup> there is a considerable consensus emerging that corporate democracy is 'phoney',<sup>44</sup> or at any rate that there are considerable limitations on shareholder influence.<sup>45</sup> Berle and Means classically viewed control and ownership of the corporation as being divorced and that 'the 'owner' of industrial wealth is left with a mere symbol of ownership while the power, the responsibility and the substance which have been an integral part of ownership in the past are being transferred to a separate group in whose hands lie control.'<sup>46</sup>

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<sup>42</sup> E. Lederman, 'Criminal Law, Perpetrator and Corporation: Rethinking A Complex Triangle' 1985 76 Journal of Criminal Law and Criminology 285-340 at p. 324.

<sup>43</sup> C. A. Riley, 'Controlling Corporate Management: UK And US Initiatives' 1994 14 2 Legal Studies 244-265 at p. 244.

<sup>44</sup> Henning in Nader and Green, n. 16 at pp. 162-3.

<sup>45</sup> Lee, 'Corporate Criminal Responsibility' 1928 28 Columbia L. R. 181-200 at p. 187.

<sup>46</sup> Berle, *The Modern Corporation And Private Property* (1933) at p. 7.

Flynn claims that most shareholders are merely speculators trading shares.<sup>47</sup> There is however a strand of opinion that suggests that Berle and Means' model is largely inapplicable in modern society with the growth of institutional shareholders,<sup>48</sup> though there is some debate as to whether these investors are interested in acting as monitors or able to operate fully under their own regulatory regimes. Certainly, there is limited evidence of growing activism on the part of institutional shareholders. For the most part the view is that they leave unreformed and unscathed those who produce profits for their investments.<sup>49</sup>

Winn suggests that our concern for overspill to shareholders is somewhat overstated. He argues that,

'Too much weight has been given in the discussion of public policy in relation to the imposition of corporate liability for crime, to the argument that since the law has prescribed certain definitive penalties which are to be incurred only by offenders having guilty knowledge and guilty intent, the innocent members of offending corporations ought not to be amenable to those penalties. They are not in fact subjected to such penalties in their personal but only in their corporate capacity; on the criminal conviction of a corporation no stockholder goes to prison unless he has abetted or otherwise involved himself in the criminal act, no individual pays the fine imposed. The sanction is borne distributively, in the same proportion as the fruits of the illegitimate enterprise have, or might have, been enjoyed. Nor does the penalty fall any harder on shareholders than on the innocent families of convicts who are not corporations.'<sup>50</sup>

Lederman rejects the similarities of the stockholder to the family member. She does so on the basis that the suffering of the family member is peripheral whereas on the stockholder the punishment is direct. The devotion of a family member may make them ready and willing to share the punishment, shareholders by definition sustain a higher sense of injustice because they are not.<sup>51</sup> Lederman also argues that only a few policy decisions on which the criminal liability may be based

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<sup>47</sup> Nader and Green, n. 16 at p. 98.

<sup>48</sup> Geis and Dimento in Pearce and Snider (Eds.), *Corporate Crime: Contemporary Debates*, (1995), at p. 125.

<sup>49</sup> Institutional investors hold 85 % of equity in UK (Pearce and Snider (Eds.), n. 48 at p. 20).

<sup>50</sup> Winn, 'The Criminal Responsibility Of Organisations' 1929 3 Cambridge L. J. 398-415 at p. 412.

<sup>51</sup> Lederman, n. 42 at p. 322; One can ameliorate overspill by collecting in instalments (Kennedy, 'Criminal Sentences For Corporations: Alternative Fining Mechanisms' 1985 73 California L. R. 443-482 at p. 455).

require shareholder approval. Her arguments are twofold; first she contends that the stockholders should not be burdened with liability for the reckless or intentional conduct of the directors or the managers<sup>52</sup> and secondly,

‘that individual stockholders of small amounts in large corporations lack the power to control or supervise-directly or indirectly- the activities of the entity. Stockholders have only scanty knowledge of the corporate structure, the flow of daily transactions, the process of decision making and the [performance of those who fulfil the directive or managerial positions. The physical separation of the stockholders from each other and from the corporation, their inability to communicate with one another, the complexity of business transactions, and their minimal amount of knowledge offered by the entity to the stockholders has caused stockholders’ power to be merely theoretical and has made the argument concerning their ability to control the corporation fictional.’<sup>53</sup>

According to Lederman, there is no reason to punish those who did not participate in the prohibited act and who, in most cases, did not even have power to prevent it.<sup>54</sup> Others too see little merit in punishing shareholders. Leigh, for example, claims that ‘any system of sanctions which depends for its efficacy upon stimulating shareholder control as a means of ensuring that managerial officers will suffer detriment as a result of criminal conduct is unlikely to prove satisfactory’<sup>55</sup> Shareholders simply cannot be relied upon to bring about reform after conviction.<sup>56</sup> According to Kennedy, ‘the average shareholder is nearly powerless to monitor or control management. Many such enterprises can be described as management controlled, without a single stockholder of sufficient stature to form the nucleus of a vote that could challenge management. Even close corporations may have a number of powerless stockholders, while the major stockholders in closely held firms ordinarily hold positions in management and could as easily be coerced through sanctions aimed directly at individual managers.’<sup>57</sup> Others naturally hope that the corporate gadfly- a minority shareholder who utilises his position to influence a more ethical approach- may operate to constrain illegal conduct.

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<sup>52</sup> Lederman, n. 42 at p. 319.

<sup>53</sup> Lederman, n. 42 at p. 320.

<sup>54</sup> Lederman, op cit. n. 42 at p. 321.

<sup>55</sup> Leigh, *The Criminal Liability Of Corporations In English Law*, (1969), at p. 153.

<sup>56</sup> Kennedy, n. 51 at p. 450.

<sup>57</sup> Kennedy, n. 51 at p. 450.



Spillover of the sanction to the shareholder may be acceptable because it is believed that investors view stockholding as a risk including risk of criminal liability<sup>58</sup> but as Glasbeek notes 'limited liability obviously encourages people to invest who do not wish to be directly responsible for the operation of the enterprise.'<sup>59</sup> Vaughan cautiously argues for a balance of stockholders' interests and the public interest but offers little in the way how that may be achieved.<sup>60</sup> Slapper draws the parallel with municipal corporations paying fines with taxpayers' money and argues that it is only fair that those who own the company should pay the penalty.<sup>61</sup> Certainly, if stockholders are made more aware of fines they can be a useful deterrent.<sup>62</sup> However, any system of corporate liability must have as its principal target the collectivity. The constituent members of that collectivity undoubtedly share the punishment. Such punishment may act as an additional incentive for shareholders to take a more active interest in the conduct of the enterprise but realistically, in the larger organisations only major shareholders, or institutions can be expected to have any real influence over the conduct of the corporation. There may even be a case for additional direct prosecution of individual shareholders who have controlling interests in large corporations.<sup>63</sup> Concern for the shareholder in all the circumstances appears misplaced. There can be no escaping the fact that ownership confers responsibilities as well as rights.<sup>64</sup> Overspill of the sanction to the shareholder, if it is any problem at all, is simply an inevitable consequence of association and in some circumstances a beneficial by-product of punishing the corporation.

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<sup>58</sup> Geis in Ermann and Lundman (Eds.), *Corporate And Governmental Deviance- Problems Of Organizational Behaviour In Contemporary Society*, (1996), at p. 291; S. Radin, 'Corporate Criminal Liability For Employee- Endangering Activities' 1983 18 Columbia Journal of Law and Society Problems 39-75 at p. 52.

<sup>59</sup> Glasbeek, 'Why Corporate Deviance Is Not Treated As A Dirty Crime - The Need To Make 'Profits' A Dirty Word' 1984 22 Osgoode Hall L. J. 126-143 at p. 137.

<sup>60</sup> D. Vaughan, *Controlling Unlawful Organisational Behaviour: Social Structure And Corporate Misconduct* (1983) at p. 49.

<sup>61</sup> Vaughan, n. 60 at p. 49.

<sup>62</sup> Kennedy, n. 51 at p. 460.

<sup>63</sup> Glasbeek, n. 59 at p. 141; Kraakman, 'Corporate Liability Strategies And The Costs Of Legal Controls' 1984 93 Yale L. J. 857-898 at p. 862.

<sup>64</sup> Ridley and Dunford, 'Corporate Killing - Legislating For Unlawful Death' 1997 26 Industrial Law Journal 99-113 at p. 100

Overspill of sanction may not simply be an issue pertinent to shareholders but may also impinge upon employees, senior executives and officers of the company. Conversely, Fisse argues that the imposition of corporate criminal liability may avoid the imposition of unfair managerial liability and in that sense is 'may uphold the distributive principle of desert.'<sup>65</sup> Fisse nevertheless accepts that the criminal law 'is capable of operating very harshly in several areas of direct relevance to the position of corporate officers and employees.'<sup>66</sup> Lower level employees may be the tools rather than the responsible originators of the violate conduct.<sup>67</sup> It seems only fitting in those circumstances that enforcement efforts should be directed at a more senior level.<sup>68</sup> In respect of individual managers/officers, Kraakman argues for 'gatekeeper liability' which imposes some of the burden upon executives to prevent wrongdoing.<sup>69</sup> Our concern should be to ensure that only those truly 'innocent' are spared sanction. Elsewhere in this thesis, I have argued for the retention of individual liability and punishment where that is appropriate. Those who assume high managerial office or directorship must do so in the knowledge that with the 'territory' comes considerable responsibility. Their actions and failings may ultimately lead to criminal sanction. This however is not the argument of overspill. That argument is rooted in the notion that in punishing the corporation others are harmed. In my opinion that should occasion us little concern where those who suffer indirectly are senior executives, directors and shareholders. It is simply an inevitable consequence of being attached to, or identified with, the collectivity.

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<sup>65</sup> Fisse, *The Allocation Of Responsibility For Corporate Crime: Individualism, Collectivism And Accountability* 1988 vol. 11 Sydney Law Review 468-513 at p. 508.

<sup>66</sup> Fisse, *The Social Policy Of Corporate Criminal Responsibility* 1978 6 Adelaide L. R. 361-412 at p. 378.

<sup>67</sup> Kadish, *Some Observations On The Use Of Criminal Sanctions In Enforcing Economic Regulations* 1963 30 University of Chicago L. R. 431 at p. 432.

<sup>68</sup> M. Clinard, *Corporate Ethics And Crime- The Role Of Middle Management*, (1983), at p. 156; According to Coffee, it is middle managers are the ones most likely to commit criminal acts and that senior executives are often remote from the chain of causation (Coffee, *No Soul To Damn, No Body To Kick: An Unscandalised Inquiry Into The Problem Of Corporate Punishment* 1981 79 Michigan L. R. 386-459 at p. 397; Kraakman, n. 63 at p. 862). Two thirds of prosecutions in America for environmental violations are of middle managers, directors or officers; this displaces the myth of deflection of responsibility onto lower level employees (S. Smith, *An Iron Fist In The Velvet Glove* 1995 19 Criminal L. J. 12-20 at p. 16).

<sup>69</sup> Kraakman, n. 63 at p. 888.

## 4.2 Some Elementary Problems Of Corporate Punishment

Various procedural issues arise in respect of punishment. For example, Bergman notes the absence of court reports on the circumstances of the corporate offender and contrasts this with the position of the individual offender.<sup>70</sup> The absence of accurate information is not conducive to the imposition of a just punishment. In addition the sanction must seek to strike a very fine balance. As Wickham explains,

‘The legal constraint, then, must achieve two often contradictory goals. On the one hand, it must be severe enough to maintain the legitimacy of the State. On the other, it must not be too severe as to diminish substantially the contribution of large corporations to growth in output and employment..Thus whereas corporations attempt to maximise profits subject to market and state constraints, the state must pursue objectives subject to the options and trade-offs that are created through the historical development of productive relationships and the need to satisfy diverse economic interests.’<sup>71</sup>

There is also the question as to whether corporations and individual corporate actors should be prosecuted at the same trial. In addition the standard of jurors’ knowledge has also been criticised in white collar crime trials.<sup>72</sup> Prosecutors face a great deal of complexity in confronting corporate crime,<sup>73</sup> and there are undoubted problems in presenting complex cases to jurors.<sup>74</sup> Prosecutors may be deterred from enforcement because of the costs involved<sup>75</sup> though Cullen et al. suggest that prosecutors are more likely to be affected by the pragmatic considerations as to whether they can win.<sup>76</sup> Further problems can be confronted within the courtroom following resolution of the question of guilt. Judicial sentencing is often a tension

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<sup>70</sup> D. Bergman, ‘*Corporate Sanctions And Corporate Probation*’ 1992 142 New L. J. 1312-1313 at p. 1312.

<sup>71</sup> Barnett in Wickham and Dailey (Eds.), *White-Collar And Economic Crime*, (1982), at p. 160.

<sup>72</sup> A. Jay, ‘*Call For Smarter Jurors In Respect Of Fraud Trials*’ Sunday Times 16/3/97 Business at p. 1.

<sup>73</sup> Braithwaite, ‘*Challenging Just Deserts: Punishing White-Collar Criminals*’ 1982 73 Journal of Criminal Law, Criminology and Police Science 723-763 at p. 753.

<sup>74</sup> F. T. Cullen, Maakestad and Cavender, *Corporate Crime Under Attack: The Ford Pinto Case and Beyond*, (1987), at p. 331; Note also the UK’s Government’s proposal in the past few days to dispense with juries in complex white-collar crime cases.

<sup>75</sup> Cullen et al, n. 74 at p. 328; Webster, ‘*An Examination Of FBI Theory Regarding White Collar Crime Investigation And Prevention*’ 1980 17 American Criminal Law Review 275-287 at p. 275

<sup>76</sup> Cullen et al, n. 74 at p. 328.

between the judge's sense of duty to society and his concern for the individual defendant.<sup>77</sup> Judges sympathetic to the positioning of the corporation recognise that one error can ruin companies.<sup>78</sup> Conversely, judges antagonistic to corporations might also be a problem.<sup>79</sup> Irrespective of all this it is fairly well established that 'Sentencing judgements respond to a broad array of considerations whose relative weights and underlying justifications are rarely spelled out.'<sup>80</sup> Kovel views criminal penalties as too 'blunt' a weapon; juries are too reluctant to impose heavy penalties on first offenders 'because of misapplied criminality, the apparatus of apprehension and proof is complicated and pointlessly burdensome.'<sup>81</sup> Bergman claims that corporate criminals responsible for death and injury in the workplace benefit from a threefold immunity in the system. First there is inadequacy in the investigation and policing, secondly there is an advisory style of enforcement which fails to punish many and finally there is the 'failure of the system to develop sentencing procedures and a wider option of sanctions so that the courts can punish, rehabilitate or deter corporate offenders. Whilst courts have a wealth of sentencing options for individual offenders the only penalty that can be imposed against company is a fine. In addition there appears to be no rational method, indeed no method at all, by which the courts come to determine the level of fine.'<sup>82</sup> Poor sentencing may be a continuum of poor policing and poor prosecution.<sup>83</sup> Carson also believes that it is at the practical level of the law in action that the white collar criminal enjoys substantial immunity.<sup>84</sup> The corporate criminal 'can often mobilise highly effective resources to protect his moral and legal propriety in the event of action being taken against him in the courts.'<sup>85</sup>

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<sup>77</sup> Renfrew, *'The Paper Label Sentences: An Evaluation'* 1977 86 Yale Law Journal 590 at p. 592

<sup>78</sup> See R. L. Heilbroner et al., *In The Name Of Profit*, (1972), at p. 125.

<sup>79</sup> Cullen et al., n. 74 at p. 332.

<sup>80</sup> Kennedy, n. 51 at p.446

<sup>81</sup> A. Kovel, *'A Case For Penalties: Air Pollution Control'* 1969 46 2 Journal of Urban Law 153-171 at p. 156.

<sup>82</sup> Bergman, n. 70 at p. 1312.

<sup>83</sup> M. Levi, *Regulating Fraud: White-Collar Crime And The Criminal Process*, (1987), at p. 211.

<sup>84</sup> Carson, *'White-Collar Crime And The Enforcement Of Factory Legislation'* 1970 10 British Journal of Criminology 383-393 at p. 384.; see also Paehlke in Pearce and Snider (Eds.), n. 48 at p. 319.

<sup>85</sup> Carson, *The Other Price Of Britain's Oil*, (1982) at p. 233; Braithwaite, *'Inegalitarian Consequences Of Egalitarian Reforms To Corporate Crime Control'* 1980 53 Temple L. Q. 1127-1146 at p. 1142.

Private prosecution is difficult and costly<sup>86</sup> and as such limited reliance can be placed upon the public to enforce the law or instigate complaints. The State must take a central role,<sup>87</sup> but even where it does so, there is an almost inegalitarian fight of Government with finite resources in individual prosecutions and corporations prepared to fight to the death.<sup>88</sup> Corporations usually have advantages over all potential legal adversaries.<sup>89</sup> Braithwaite's conception of further inegalitarian consequences is predicated on the notion in an attempt to capture corporate criminals the whole web of law is expanded and as a consequence more loopholes are created. The corporation is most able to benefit because they 'can turn the web of law to their advantage and to the disadvantage of 'irrational' consumers and workers.'<sup>90</sup> Corporations can also exploit transnational differences in law.<sup>91</sup> Accordingly, one recognises a number of preliminary problems which may require to be addressed. Tackling them however is not central to this thesis or the outline model in chapter 6. Recognition of them as problems is important for all that.

### 4.3 Corporations And The Theory Of Punishment

#### Just Deserts Or Utilitarianism

It is generally accepted that criminal law engenders several often contradictory goals. Those differing objectives undoubtedly exercise much influence over both the nature and extent of criminal sanctions to be applied to the corporate form. Any penological framework requires to evidence those goals thought desirable. The theory of just deserts dictates that criminal should be punished because they deserve to be punished and that the quantum of their suffering should be in proportion to the seriousness of their crime.<sup>92</sup> Kantian desert dictates that,

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<sup>86</sup> M. Tigar, 'It Does The Crime But Not The Time: Corporate Criminal Liability In Federal Law' 1990 17 American Journal of Criminal Law 211-234 at p. 217.

<sup>87</sup> L. Snider, 'Corporate Crime In Canada: A Preliminary Report' 1978 20 Canadian Journal of Criminology 142-168 at p. 159; According to Hawke there are strong arguments in favour of utilising a more aggressive use of prosecution because it emphasises the arbitrariness of selective enforcement based on a compliance strategy (Hawke, 'Crimes Against The Environment' 1987 16 Anglo-American L. R. 93 at p. 94).

<sup>88</sup> Braithwaite, n. 85 at p. 1135.

<sup>89</sup> Braithwaite, n. 85 at p. 1135.

<sup>90</sup> Braithwaite, n. 85 at pp. 1136-7.

<sup>91</sup> Braithwaite, n. 85 at p. 1132.

<sup>92</sup> Braithwaite, n. 73 at p. 723; Von Hirsch, *Doing Justice The Choice Of Punishments* (1976); Kellog 'From Retribution To Desert: The Evolution Of Criminal Punishment' 1977 15 Criminology



‘Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the law of things. His innate personality (that is his rights as a person) protects him against such treatment, even though he may be condemned to lose his civil personality. He must first be found deserving of punishment for himself or for his fellow citizens. The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it.’<sup>93</sup>

Proportionality of punishment has three elements- choice, blameworthiness, and proportionality of individual punishments to each other and to the underlying severity of the offence.<sup>94</sup> According to Von Hirsch, desert theory relies upon the idea of a fair distribution of benefits and burdens.<sup>95</sup> He argues that,

‘When the principle of proportionality is disregarded, offenders are unfairly visited, through the penalties imposed on them, with more implicit blame (or less) than the actual blameworthiness of their conduct warrants.’<sup>96</sup>

The Kantian just deserts philosophy is attacked by Bentham’s utilitarian theory of punishment. Davis has also argued that we should adopt a utilitarian approach to punishment<sup>97</sup> without doing so ‘retributivism is at best vacuous.’<sup>98</sup> Utilitarianism is predicated on the actual or probable consequences of the punishment. Davis contends that ‘the criminal law would have no use where people were not more or less rational where, that is, people did not adjust their acts to take into account possible consequences.’<sup>99</sup> However, it has been argued that, ‘Neither the

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179. The benefits/burdens theory of desert is attributed to Kant and ‘focuses on the unjust advantage the offender has obtained in failing to refrain to restrain himself while benefiting from the restraint of others, the magnitude of the punishment should reflect the extent of the advantage’ (Von Hirsch, ‘*Proportionality In The Philosophy Of Punishment*’ 1990 1 Criminal Law Forum 259 at p. 265); see also F. G. Jacobs, *Criminal Responsibility*, (1971) at p. 8.

<sup>93</sup> Kant, *The Metaphysical Elements Of Justice* Ladd trans, 1965 100 quoted in Nemerson, n. 23, at p. 1561

<sup>94</sup> Parker, n. 2 at p. 565.

<sup>95</sup> Von Hirsch, n. 92 at p. 261.

<sup>96</sup> Von Hirsch, n. 92 at pp. 262-3.

<sup>97</sup> M. Davis, ‘*How To Make Punishment Fit the Crime*’ in *Criminal Justice*, (1985, Pennock and Chapman Eds.) at p. 119.

<sup>98</sup> Davis, n. 97 at p. 120.

<sup>99</sup> Davis, n. 97 at p. 122.

retributive theory of punishment nor the utilitarian theory entails as such any specific principles of criminal liability. So far as the retributive theory is concerned, the question that arises is whether it seeks to pay back the individual for the harm he has done, for the consequences of his conduct, or whether it seeks in some way to redress his moral guilt, where this is conceived as something independent of the outward consequences of his actions.’<sup>100</sup>

Braithwaite argues that approximate even handedness in the way the powerful and the powerless are punished can be approached but only if just deserts is rejected as the rationale for punishment.<sup>101</sup> In his view utilitarian policies can achieve greater even-handedness. According to Braithwaite, utilitarianism offers the possibility of redressing such a situation on the basis that the corporation alone can correct the standard operating procedure and as such where the impact of the sanction can be most effective. Alternatively, utilitarian principles may dictate that punishment might be best directed at the individual because to sanction the corporation might be overly harmful. In certain circumstances deterrence might be better achieved by punishing the individual wrongdoer. In contrast, just deserts dictates that it would not be fair to blame just the corporation when there are guilty individuals and similarly it would be unfair simply to blame individuals where additionally there was corporate fault.<sup>102</sup> Such analysis inevitably leads to attempting to determining the apportionment of punishment between the individual and the corporation. Who deserves punishment more? Unlike deserts, utilitarianism can cater for situations where the penalty is likely to bankrupt the company.<sup>103</sup> Moreover just deserts can lead to the imposition of a penalty which simply does not deter. Braithwaite concludes that, ‘The difference is that whereas our attainment of utilitarian goals is very imperfect, the quest for just deserts is worse than imperfect; it is counterproductive. Social structured realities allow us to impose desert only when desert is least deserved. Through adopting justice as a goal, we increase

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<sup>100</sup> Jacobs, n. 92 at p. 13; Byam, ‘*The Economic Inefficiency Of Corporate Criminal Liability*’ 1982 73 *Journal of Criminal Law and Criminology* 582 at p. 586

<sup>101</sup> Braithwaite, op cit. n. 73 at p. 724.

<sup>102</sup> Braithwaite, n. 73 at p. 727.

<sup>103</sup> Braithwaite, n. 73 at p. 757.

injustice.’<sup>104</sup> In the process he rejects a dual system and argues that utilitarianism should be adopted for both common crime and white collar crime.<sup>105</sup> Braithwaite canvasses three options- utilitarian goals with desert as the constraint, desert as the goal with utilitarianism as the constraint, or alternatively both being weighed conjointly without either acting as a constraint on the other. He is critical of them all. Braithwaite claims a total commitment to uniformity and consistency in the treatment of corporate offenders should be eschewed on the basis that it is financially inexpedient.<sup>106</sup> Instead he proposes that just deserts be forgotten in order to get some corporations to co-operate with regulatory agencies.<sup>107</sup> Braithwaite challenges the just deserts philosophy of Von Hirsh which advocates primacy to equality and uniformity of sentencing with crime prevention as a secondary goal. He is equally critical of the theorists who argue for primacy to be accorded to crime prevention with a secondary goal being uniformity of sentencing. In Braithwaite’s view primacy should be accorded to reduction of risk to human health and that equity considerations should never constrain that primary goal.<sup>108</sup> Desert as a basis for punishment throws up several conundrums. Not least among them is, in respect of individuals, how much punishment is due to the senior corporate actor oblivious to the wrongdoing but nonetheless accountable for it. Utilitarianism of course is straightforward; punishment should be meted out because it will deter others. Parker explains that,

‘The perceived conflict between deterrence and proportionality arises from the idea that deterrence-based penalties are determined solely by their deterrent effect on persons other than the offender. Hence, the philosophical objection is that the individuals punished are being treated merely as the means to some other objective, rather than as moral ends in themselves. There is no objective to organizational penalties, as organizations are not moral ends, but simply instruments for the achievement of other objectives...’<sup>109</sup> ‘the gain-based penalties of classical deterrence will eventually conflict with the competing goal of ‘proportionality’ among penalties. Due to the basic disconnection

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<sup>104</sup> Braithwaite, n. 73 at p. 758.

<sup>105</sup> Braithwaite, n. 73 at p. 761.

<sup>106</sup> Braithwaite, n. 7 at p. 291

<sup>107</sup> ‘The uniform and just treatment of offenders should never take precedence over protection of human life’ (Braithwaite, n. 7 at p. 292).

<sup>108</sup> Braithwaite, n. 7 at p. 307 op cit.

<sup>109</sup> Parker, n. 2 at p. 564.

between the gain measure for penalties and the underlying differences (or similarities) in offence severity.<sup>110</sup>

### **Deterrence or retribution ?**

Corporate criminal punishment may also be premised on the basis of retribution. Woolfson, Foster and Beck argue for appropriateness of sanction and that considerable harm should be met with considerable sanctions. According to them, 'Ultimately the punishment of a corporation misconduct is necessary, not because it is a deterrent, but because it is the emphatic denunciation of a crime..it is critical for a society to state that the negligent treatment of employees, the endangering of the workforce, is unacceptable.'<sup>111</sup> Stoner argues that 'Legal theorists must stop ignoring the real value of retribution, which is a balancing influence in our system.'<sup>112</sup> Despite the recognition of retribution as legitimate goal of criminal punishment, deterrence dominates as the rationale for punishing corporations. Fisse explains why deterrence rather than retribution lies at the root of much of the jurisprudence of corporate crime. He notes that,

'retribution has been widely criticised as a justification for punishment, but to accept this as an explanation would be to underrate the theoretical and popular support which retributive theories of punishment still command. A more plausible explanation is that the general justifying aims of retribution are inapposite in the case of corporations and, more significantly, that retribution requires desert in distribution, whereas punishment applied to a corporation almost invariably harms numerous shareholders and other persons who are not responsible and hence do not deserved to be punished.'<sup>113</sup>

It has been claimed that 'while the primary aim of corporate criminal sanctions is deterrence, there may also be some retributive limitations on the pursuit of this goal, and the courts as well as legislatures will likely continue to require some

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<sup>110</sup> Parker, n. 2 at p. 557.

<sup>111</sup> C. Woolfson, J. Foster and M. Beck, *Paying For The Piper - Capital And Labour In Britain's Offshore Oil Industry*, (1997), at p. 426.

<sup>112</sup> Stoner, 'Corporate Criminal Liability For Homicide: Can The Criminal Law Control Corporate Behaviour' 1985 South Western L J 1275-1292 at pp. 1294-5.

<sup>113</sup> Fisse, n. 66 at p. 405.

blameworthiness on the part of the defendant in the vast majority of cases.<sup>114</sup> Byam argues that only deterrence is appropriate to corporate entities.<sup>115</sup>

Retributive justice require corporations to be punished because of the unfair advantage that they would otherwise accumulate through corporate crime.<sup>116</sup> Is retribution incompatible with deterrence?<sup>117</sup> According to Fisse, the general preventive aims of corporate criminal responsibility are broadly the same as for individual criminal responsibility -socialisation, maintenance of respect for the law, habit -building and provision of a rationale for conformity.<sup>118</sup> Fisse says that 'The most important aim served by corporate criminal responsibility is probably deterrence...whether upon the particular offender subject to sentence ('special deterrence') or prospective offenders generally ('general deterrence').<sup>119</sup> He goes on to explain the particular, but indirect, deterrent effects desired by corporate punishment claiming that

'Coercive force is applied indirectly to officers, employees, shareholders and others as a result of lower corporate profits(as though less generous salaries, bonuses or perquisites), reduced corporate prestige, or internal discipline ..Perhaps more importantly, there is also the threat of detection and conviction *per se*, whether of the corporate employer or, in the event of internal discipline, the employee himself.'<sup>120</sup>

Bergman claims that 'Offending companies should be subject to sentences that are commensurate with the seriousness of the crime, likely to deter others and to prevent recidivism. At present the penalties imposed by the courts completely fail to achieve these aims.'<sup>121</sup> However, it has been argued that

'It is by no means generally accepted that deterrence alone is sufficient to justify regulating corporate activities through criminal sanctions. The common imposition of an intent requirement ..and the ..recognition

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<sup>114</sup> 'Developments In The Law: Corporate Crime, Regulating Corporate Behaviour Through Criminal Sanction', 1979 Harvard Law Review 1229-1375, at p. 1241

<sup>115</sup> Byam, n. 100 at p. 582.

<sup>116</sup> Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault And Sanctions' 1982 56 Southern California L. R. 1141-1246 at p. 1171.

<sup>117</sup> See Fisse, n. 116 at pp. 1180-1.

<sup>118</sup> Fisse, n. 66 at p. 391.

<sup>119</sup> Fisse, n. 66 at pp. 370

<sup>120</sup> Fisse, n. 66 at p. 370-1; cf. B. D. Baysinger, 'Organisation Theory And The Criminal Liability Of Corporations' 1991 71 Boston University L. R. 341-376 at p. 355

<sup>121</sup> Bergman, n. 70 at p. 1313.



of the dichotomy between regularity aims and the criminal law, all indicate the preference for some retributive element in statutes imposing corporate criminal liability. Thus while the primary aim of corporate criminal sanctions is deterrence, there may be some retributive limitations on the pursuit of this goal, and courts as well as legislatures will likely continue to require some blameworthiness on the part of the defendant in the vast majority of cases.<sup>122</sup>

Fisse rehearses various reasons why corporate criminal liability is necessary for the purposes of deterrence of criminal conduct:- organisational secrecy; the number of suspects; corporate negligence; corporate profits; corporate surrogacy of responsibility; distinct corporate offences; and the fact that some corporate personnel are beyond the jurisdiction of the prosecuting authorities.<sup>123</sup> Deterrence is most likely when sanctions are congruent with values they are intended to have an impact on.<sup>124</sup> It is argued that deterrence can be effected by fines because the corporation is a profit maximisation unit.<sup>125</sup> Fisse explains his rationale by saying 'In bureaucratic practice, if not in classical economic theory, corporations are agencies having non-monetary as well as monetary goals'<sup>126</sup> 'This is not to say that the values of money power and prestige are not disjoined, in practice, pursuit of any one tends to promote the others.'<sup>127</sup> Fisse explains the relationship between deterrence and rehabilitation and incapacitation suggesting that,

'if deterrence is a goal distinct from rehabilitation and incapacitation- a concept which now appears prevalent- then rehabilitation and incapacitation are discrete civil goals that provide no foundation for corporate criminal law. But to treat rehabilitation and incapacitation as distinct from deterrence when applied to corporate criminal law is to entertain a misconception. Policy revision, internal disciplinary control, and procedural action- the forms of rehabilitation and incapacitation that are most practical and useful in preventing corporate crime - are sub-goals of deterrence.'<sup>128</sup>

## Restitution

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<sup>122</sup> *Developments*, n. 114 at p. 1241

<sup>123</sup> Fisse, n. 66 at p. 371.

<sup>124</sup> Fisse, n. 116 at p. 1156.

<sup>125</sup> See Byam, n. 100 at p. 587

<sup>126</sup> Fisse, n. 116 at p. 1154.

<sup>127</sup> Fisse, n. 116 at p. 1155.

<sup>128</sup> Fisse, n. 116 at p. 1159.

Restitution is increasingly being advanced as a objective of criminal justice.<sup>129</sup> Restitution, compensation and restoration may also be important in the context of corporate criminal liability.<sup>130</sup> Zedner explains the transition from the traditional perspective by noting that,

‘We are accustomed to seeing criminal justice as the repressive arm of the state, but might it not better be conceived as one end of a continuum of practices by which social order is maintained ? Punishment has a very limited ability to control crime and to the extent that it is disintegrative, it inflicts further damage on society. Given that the high profile ‘law and order policies’ of the past decade have done little to stem spiralling crime figures, perhaps it is time to explore integrative potential of reparative justice on its own terms.’<sup>131</sup> The use of corporate criminal responsibility to achieve remedial as well as penal aims has its roots principally in the major development of regulatory offences.’<sup>132</sup>

Zedner points a the paradoxical simultaneous renaissance of retributive and reparative models of justice.<sup>133</sup> She welcomes the attempts to bridge the gap between the two in the process questioning ‘the usefulness of this dichotomised approach to penal theory.’<sup>134</sup> The re-emergence of reparative justice represents a ‘re-assertion of populist right of participation’ linked to a perception of failure on the part of punishment within the criminal justice system.<sup>135</sup> As Zedner recognises, reparative justice demands,

‘the abandonment of culpability of the offender as the central focus of sentencing and in its place...much closer attention to harm. It would reconceive crimes less as the willed contraventions of an abstract moral code enshrined in law but, more importantly, as signals of social dysfunction inflicting harm on victims..as well as society.’<sup>136</sup>

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<sup>129</sup> Note, n. 3 at p. 370 op cit.; Levi, n. 83 at p. 214.

<sup>130</sup> See also C. Wells, ‘Organisational Responses To The Risk Of Criminal Liability’ (1995) Paper, at p. 4.

<sup>131</sup> Zedner, ‘Reparation And Retribution: Are They Reconcilable’ 1994 57 Modern L R 228 at p. 250.

<sup>132</sup> Fisse, n. 66 at pp. 397-8.

<sup>133</sup> In America under the guidelines for sentencing one of the integral features is that the company should make restitution to identifiable victims of the criminal conduct as a first priority (J. Levitske, ‘Will The US Sentencing Commissions Proposed Guidelines For Crimes By Organisations Provide An Effective Deterrent For Crimes Attributed To Corporations?’ 1991 29 Duquesne L. R. 782-802 at p. 791).

<sup>134</sup> Zedner, n. 131 at p. 228.

<sup>135</sup> See Zedner, n. 131 at p. 232.

<sup>136</sup> Zedner, n. 131 at p. 233.

It is desirable that reparation should involve both material and symbolic elements.<sup>137</sup> Despite its re-emergence there are various criticism of reparative justice- primarily based on the premise that it is not overtly punitive, and also the expense on victim in asserting rights. There are further problems with reparative justice- the ability of the rich to buy themselves out of punishment and also that it allows the victim to influence sentencing and in so doing would damage consistency.<sup>138</sup>

What are we to make of theory of sanctions and how it influences our approach to the corporate form ? Like so many of the theories endemic to corporate criminal liability one is drawn inexorably by the strident articulation of commentators into a position where one considers that one must make a choice. It is only by standing back a little that one realises that no such choice is necessary. Our system already seeks to strike an equilibrium between competing theories of criminal sanction. All we need do is recognise that these theories exist, the tensions they create, and resolve that in our scheme of corporate criminal liability we will recognise retribution, deterrence and reparation as features of our newly invigorated sanctioning regime.

#### **4.4 Punishing The Corporate Criminal- A Brief American Perspective**

The defining statute relative to corporate punishment in America of Federal offences is the Sentencing Reform Act 1984. The Objectives of the 1984 Act are

- '(1) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment*
- (2) the need to afford adequate deterrence to criminal conduct*
- (3) the need to protect the public from further crimes of the defendant;*
- and*
- (4) the need to provide the defendant with educational treatment in the most efficient manner.'*<sup>139</sup>

Under the Sentencing Reform Act 1984, the US Sentencing Commission was required to prepare guidelines for the punishment of corporations (and individuals).

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<sup>137</sup> Zedner, n. 131 at p. 238.

<sup>138</sup> See Zedner, n. 131 at p. 245.

<sup>139</sup> 18 US 3553(a) Supp III 1985.

The process began in 1986. Both its first draft (published in 1989) and a revision published in 1990 were severely criticised as was its final adopted proposals in 1991.<sup>140</sup> The United States Sentencing Commission's guiding principles for corporate offences include the following -order the organisation to remedy any harm caused by the offence; if the organisation operated primarily for a criminal purpose, the fine should be set high enough to divest the organisation of all its assets; the fine should be based on the seriousness of the offence and the culpability of the organisation; corporate probation is an appropriate sanction if it will ensure another sanction will be fully implemented or that steps will be taken within the organisation to prevent repetition.<sup>141</sup> The guidelines developed by the Commission are now enshrined in the Federal Rules of Criminal Procedure. In the United States corporate fines can be up to \$500,000 for misdemeanour resulting in loss of life, and \$200,000 for other offences (Class A misdemeanours) and \$10,000 for other offences.<sup>142</sup> In USA Federal sentencing procedures require a pre-sentencing investigation into corporate offenders.<sup>143</sup> The Act rejects publicity and corporate imprisonment as sanctions but supports fines, forfeiture, notice to victims and restitution and probation.<sup>144</sup> Moreover, under the 1984 Act probation is seen as a distinct sentence rather than a conditional suspension of some other sentence. Equally importantly, it can be imposed along with another sentence.<sup>145</sup> The Act provides mandatory probation in certain circumstances and discretionary in others. Discretionary probation must bear a reasonable relationship to the nature and circumstances of the offence, the history and characteristics of the defendant and the four goals of sentencing.<sup>146</sup> Pre-sentence reports are prepared unless the court renounces the need for such a report. There is scope for professional consultants to be brought in if the courts need further information. Probation conditions can be

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<sup>140</sup> See Butler, 'A National Conference On Sentencing Of The Corporation' 1991 71 Boston University L. R. at pp. 189-191.

<sup>141</sup> US Sentencing Guidelines Introductory Comment Chap 8 at p. 337; J. Lemkin, 'Deterring Environmental Crime Through Flexible Sentencing: A Proposal For The New Organisational Environmental Sentencing Guidelines' 1996 83 California L. R. 307 at p. 327.

<sup>142</sup> Gruner, *Corporate Crime And Corporate Sentencing*, (1994) at p. 429 and pp. 444-452

<sup>143</sup> Rule 32 (c)(1); Gruner, n. 142 at pp 440-1

<sup>144</sup> Parker, n. 2 at p. 534ff; Gruner, n. 142 at pp. 452-3, and pp. 683-745

<sup>145</sup> Gruner, 'To Let The Punishment Fit The Organisation: Sanctioning Corporate Offenders Through Corporate Punishment' 1989 16 Americana Journal of Criminal Law 1-106 at p. 31; also Gruner, n. 142 at pp. 427-509

<sup>146</sup> Gruner, n. 145 at p. 32 op cit.

reduced or enlarges and the court has the power to terminate probation before its expiry. Likewise the court can extend the probation period. In addition probationers must pay a fine, pay restitution or engage in community service. Both the foregoing conditions are mandatory in all cases.<sup>147</sup> The requirement to abide by the law may be particularly problematic for corporate offenders, especially large corporations 'this may result in a significant uncertainty on the part of firm managers about the significance of other probation terms, and a corresponding apathy about complying with those terms.'<sup>148</sup> Gruner suggests it would be better to insist on lawful compliance with a part of the enterprise or the prevention of crimes of a similar nature.<sup>149</sup>

Civil penalties are applied in respect of health and safety law in America because of the adoption of strict liability in relation to such offences.<sup>150</sup> Treble damages suits are also possible in USA.<sup>151</sup> In America *quo warranto* actions can be raised to revoke the corporate charter or restrict corporate activities. This amounts to corporate death penalty.<sup>152</sup> The action is brought by the State government. Morris also notes the more aggressive enforcement of pollution control through what are known as *qui tam* action. Essentially, individuals bring private prosecutions because under the particular pollution statute anyone providing information leading to conviction may at the courts' discretion be awarded half the fine imposed as a reward.<sup>153</sup>

The American Bar Association's own view of punishment is that,

'the sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized. The sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the

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<sup>147</sup> Gruner, n. 145 at p. 35

<sup>148</sup> Gruner, n. 145 at p. 36

<sup>149</sup> Gruner, n. 145 at p. 36

<sup>150</sup> Frank, 'From Criminal To Civil Penalties In The History Of Health And Safety Laws' 30 Social Problems 532-544 at p. 532.

<sup>151</sup> See *Developments*, n. 114 at pp. 1351-1360

<sup>152</sup> See Laughran, 'The Law And The Corporate Polluter' 1972 23 Mercer L. R. 571 at pp. 589-592.

<sup>153</sup> See Morris, 'Environmental Problems And The Use Of The Criminal Sanction' 1972 7 Land and Water L. R. 421-431 at p. 425.



offender, the offender's criminal history, and his personal characteristics.<sup>154</sup>

Within those parameters, there is limited evidence of a more diversified strategy for the punishment of the corporate criminal but perhaps not as one might imagine. The foregoing provisions on probation are particularly instructive. Moreover, The American Bar Association 'Standards for Criminal Justice' recognise the possibility of judicial monitoring of corporations.<sup>155</sup> The options in America still do not show enormous enlightenment. The range of sanctions available though more expansive than anywhere else in the world, do not include many other possibilities proffered by commentators in the Anglo-American jurisdictions. Consideration of those possibilities may open up a more efficacious and expansive system of sanctions applicable to the corporate criminal.

#### 4.5 Corporate Fines

The fine has been the obvious and preponderant sanction for corporate crime in all jurisdictions.<sup>156</sup> Its usage has been supported as the logical sanction given both the organisational goals of corporations and perhaps given that most corporate crimes

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<sup>154</sup> ABA Standards for Criminal Justice Sentencing, (1994, 3rd Ed) Standard 18-6.1 at p. 219.

<sup>155</sup> 18.2.8(a)(v) 'Continuing Judicial Oversight. Although courts lack the competence or capacity to manage organisations, the preventative goals of the criminal law can in special cases justify a limited period of judicial monitoring of the Activities of a convicted organization. Such oversight is best implemented through the use of recognised reporting, record keeping, and auditing controls designed to increase internal accountability-for example, audit committees, improved staff systems for the board of directors, or the use of special counsel-but it should not extend to judicial review of the legitimate 'business judgment' decisions of the organization's management or its stockholders or delay such decisions. Use of such special remedy should also be limited by the following principle:

(A) As a precondition, the court could find either (1) that the criminal behaviour was serious, repetitive, and facilitated by inadequate internal accounting or monitoring controls or (2) that a clear and present danger exists to the public health or safety;

(B) The duration of such oversight should not exceed the five and two year limits specified in standard 18.2.3 for probation conditions generally; and

(C) Judicial oversight should not be misused as a means for disguised imposition of penalties or affirmative duties in excess of those authorised by the legislature.'

<sup>156</sup> Kennedy, n. 51 at p. 445. Fines developed as an alternative to physical punishment towards the end of the 19th Century (D. W. Elliot, 'The Criminal Company' 1966 at p. 11). Fines are most frequently used and are increasing in use because of the expansion of the criminal law into regulatory offences where imprisonment not appropriate (D. Bein, 'Payment Of A Fine By A Person Other Than The Defendant - Law And Policy' 1974 9 Israel L. R. 325 at 325). A study by Cohen of Federal sentencing strategy reveals that 89% of corporations received fine- 16% were ordered to pay restitution

are economic crimes.<sup>157</sup> Fines are designed to inflict economic punishment rather than extract profit making gain.<sup>158</sup> Braithwaite offers one suggestion as to their attraction in claiming that, 'Fines have a seducing mathematical attraction to those who are concerned with equity in sentencing because of their quantitative adjustability to the offenders means and the gravity of the offence.' For all that 'proponents of fines often succumb too readily to a national economic conception of corporate crime. While a great deal of crime is committed for the sake of corporate profit, a great deal is not.'<sup>159</sup>

Freiberg claims that though the fine is a common penalty it is subject to few decisions which define the principles of its use.<sup>160</sup> Having said this, she goes on to note that conduct which seeks to make unfair profit is likely to incur harsher penalties.<sup>161</sup> Parker simply asserts that fines are scaled inconsistently in law and in practice.<sup>162</sup> Heilbroner goes further by suggesting that fines often have little impact.<sup>163</sup> There is a dilemma that if fines are too small they are easily absorbed, if moderate they may simply be reflected in consumer prices, and if excessive the corporation may suspend or transfer its activities.<sup>164</sup>

The three principle reasons for fines advanced by commentators are-that they are cheaper to society, they can be used to compensate victim and, essentially that they are a transfer payment involving no dead loss to society. The arguments often arraigned against fines are that- they may be passed on,<sup>165</sup> they do not incapacitate the dangerous offender, they are difficult to define in a trade-off with incarceration,

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<sup>157</sup> Sutherland, *White Collar Crime* (1949) at p. 159

<sup>158</sup> Dershowitz, 'Increasing Community Control Over Corporate Crime' 1961 70 Yale L. J. 280-360 at p. 294; Slapper n. 3 at pp. 126-128

<sup>159</sup> Braithwaite, n. 7 at p. 331.

<sup>160</sup> Freiberg, 'Monetary Penalties Under The Trade Practices Act 1974 (Cth)' 1983 11 Australian Business L. R. 4-26 at p. 5; See also *Kvaerner Govan Ltd. v HMA* 1992 SCCR 10

<sup>161</sup> Freiberg, n. 160 at p. 15.

<sup>162</sup> Parker, n. 2; Slapper, n. 3

<sup>163</sup> Heilbroner et al., n. 78 at p. 123.

<sup>164</sup> Grygier, n. 19 at p. 22

<sup>165</sup> Reality is that fines imposed on individuals often fall upon organisations (Coffee, 'Corporate Crime And Punishment; A Non-Chicago View Of The Economics Of Criminal Sanctions' 1980 17 American Criminal Law Review at pp. 424-5).

<sup>165</sup> Parker, n. 2 at p. 523; see also Snider, n. 87 at p. 161.

and that reliance on fines is discriminatory against the poor.<sup>166</sup> There are also those who adopt a reverential attitude to the corporation and who argue that 'A system of corporate penalties should avoid imposing punishment in a form or manner that disrupts the competitive process that provides benefits to society as a whole.'<sup>167</sup>

Posner supports fines as the optimal penalty for deterring corporate crime positing that,

'In a social cost-benefit analysis of the choice between fining and imprisoning the white collar criminal, the cost side of the analysis favours fining because... the cost of collecting the fine from one who can pay it is lower than the cost of imprisonment. On the benefit side, there is no difference in principle between the sanctions. The fine for a white collar criminal can be set at whatever level imposes the same disutility on the defendant, and thus yield the same deterrence, as the prison sentence that would have been imposed instead. Hence fining the affluent offender is preferable to imprisoning him from society's standpoint because it is less costly and no less efficacious'... 'In a social cost-benefit analysis of the choice between fining and imprisoning the white collar criminal, the cost side of the analysis favours fining because...the cost of collecting a fine from one who can pay it..is lower than the cost of imprisonment' and 'because the dollars collected from the criminal as a fine show up on the benefit side of the social ledger, the net social cost is limited to the costs of collecting the fine.'<sup>168</sup>

Posner recognises the limitation of his view particularly, if one perceives that no fine can be calibrated to equate to imprisonment. However, he argues that the reality is that white-collar criminals simply don't get long sentences. Posner believes that the argument that imprisonment by definition is more punitive than a fine is 'fallacious.'<sup>169</sup> Once a crime has been committed these costs to society become sunk costs lost forever.<sup>170</sup> However, corporations are in a unique position to repay society and as such those 'sunk 'costs can be internalised.<sup>171</sup> It is in all senses a rampant free marketeering philosophy. Parker is supportive of the

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<sup>166</sup> Coffee, n. 165 at p. 442

<sup>167</sup> Parker, n. 2 at p. 523; see also Snider, n. 87 at p. 161

<sup>168</sup> Posner, 'Optimal Sentences For White Collar Criminals' 1980 17 American Criminal Law Review 409-418 at p. 410

<sup>169</sup> Posner, n. 168 at p. 415

<sup>170</sup> See Posner, 'Retribution And Related Concepts Of Punishment' 1980 9 J Legal Studies 71 at p. 74

<sup>171</sup> Fisse, n. 116 at p. 1173

economic analysis of penalties on the basis that the 'provide a sound basis for a realistic and effective organizational sentencing policy that furthers the traditional purposes of criminal punishment.'<sup>172</sup> The 'Free Market' theory specifies an optimal penalty equal to the total external harm or loss caused by an offence (including the enforcement costs) divided by the probability that the offence would be detected and punished.<sup>173</sup> Coffee offers a less than veiled critique of the economic intervention into penology claiming,

'Among economists, the tide of academic imperialism has reached full flood. No longer content to focus the tools of their profession on the traditional problems of economics, over the last dozen years they have begun to analyse aspects of human behaviour not characterized by market transactions. In so doing, economists have applied their central premise that individuals engage in utility maximising behaviour to such diverse fields as family planning, political participation, altruism and crime.'<sup>174</sup>

Because organisations are mostly motivated by monetary considerations there is a belief that they are therefore likely to most responsive to monetary sanctions.<sup>175</sup> Lederman contends that non-economic sanctions are inappropriate for the corporation.<sup>176</sup> She defines economic sanctions as 'fines and supplementary economic measures (which include forfeiture of profits, temporary or permanent restraining orders, withdrawal of licences). Lederman contends that fines are the most appropriate sanction because 'The purpose of corporations is economic profit and business operations almost always benefit, directly or indirectly, from the criminal activity undertaken within the corporate framework.'<sup>177</sup> However, she rather extravagantly extrapolates that fines therefore appear to act as deterrents for criminal negligence. Lederman herself accepts the paucity of this argument and accepts that imposing fines on corporations does not always advance the goals of punishment.<sup>178</sup> This is so because pecuniary penalties are relatively low or because

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<sup>172</sup> Parker, n. 2 at p. 516

<sup>173</sup> Parker, n. 2 at p. 517 op cit.

<sup>174</sup> Coffee, n. 165 at p. 419. Despite this 'criminal law has long stood in need of the kind of rigorous cost-benefit examination that the economist can offer' Coffee, n. 165 at p. 420. 82 % of cases in Federal courts result in fines (Parker, n. 2 at p. 522)

<sup>175</sup> Parker, n. 2 at p. 523

<sup>176</sup> Lederman, n. 42 at p. 309

<sup>177</sup> Lederman, n. 42 at p. 311

<sup>178</sup> Lederman, n. 42 at p. 311

finer are an inappropriate sanction. Moreover, as suggested earlier fines may simply result in a transference of the burden to the consumer.

The fine has major limitations if it is accepted that corporations can commit the full gamut of offences.<sup>179</sup> Acceptance of economic sanctions as the only possible punishment inevitably limits the scope of corporate criminal liability. Of course, the problem may be circumnavigated by there substitution of economic penalties for other penalties where the offender is a corporation. This approach has limited intellectual appeal. As Lederman points out as an approach it 'expresses a lack of sensitivity to the real significance of the corporal punishment imposed by criminal law in cases of severe offenses which recognizes and emphasizes that such violations cannot be absolved by monetary sanctions alone.'<sup>180</sup>

Yoder argues that in order to equitable fines should reflect the magnitude of the harm and the size of the corporation.<sup>181</sup> He suggests fixed percentages of corporate profits as basis of imposition. Fisse notes the possibility of linking fines to corporate profits but equally notes that amongst other things any enquiry into ill-gotten profits would be fraught with accounting difficulties.<sup>182</sup> Indeed there are a number of difficulties in scaling fines for corporations.<sup>183</sup> According to Iseman the structure and size of the corporate fines are often 'impotent and unjust.'<sup>184</sup> Yoder similarly claims that fines lack credibility because they are too low.<sup>185</sup> They are incapable of diminishing profits or damaging goodwill.<sup>186</sup> In short they represent 'just another cost of doing business.'<sup>187</sup> Moderate fines simply do not deter;<sup>188</sup>

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<sup>179</sup> Lederman, n. 42 at p. 313

<sup>180</sup> Lederman, n. 42 at p. 313

<sup>181</sup> S. Yoder, 'Criminal Sanctions For Corporate Illegality' 1978 69 Journal of Criminal Law and Criminology 40-58.

<sup>182</sup> Fisse, 'Responsibility, Prevention And Corporate Crime' 1973 5 New Zealand University L. R. 250-279 at p. 251.

<sup>183</sup> Levitske, n. 133 at p. 794

<sup>184</sup> Iseman, 'The Criminal Responsibility Of Corporate Officials For Pollution Of The Environment' 1972 37 Albany L. R. 61-96 at p. 62

<sup>185</sup> Yoder, n. 181 p. 48; see also comments of Judge Wilkins Chair of US Sentencing Commission (Levitske, n. 133 at p. 783). Average fine in America during 1984-7 was \$48,000 with 67 % of fines below \$10,000. (Levitske, n. 133 p. 786).

<sup>186</sup> Yoder, n. 181 p. 48

<sup>187</sup> Yoder, n. 181 p. 48; In 1991 the average fine for health and safety matters in the UK was little over £700 (Bergman, n. 70 at p. 1312).



larger fines will undoubtedly enhance deterrence.<sup>189</sup> According to Kennedy, that deterrence is achieved not through fear of the sanction or stigma, but by withdrawing the motive.<sup>190</sup> Some commentators argue that corporations should be fined in proportion to their financial capacity.<sup>191</sup> Bergman's view is that, 'Increasing fines- with the aid of corporate enquiry reports and 'unit fines' which reflect more closely the wealth of the company is a much needed reform, but not the complete answer.'<sup>192</sup> However, Gruner believes that simply elevating fines is unlikely to achieve the desired objective,<sup>193</sup> not least because a deterrence trap may ensue where the fine necessary is too big for corporation to pay.<sup>194</sup> It is often a cruel irony that the largest harm is usually caused by the firms that can least afford to pay for it.<sup>195</sup> Bixby notes that options include linking the fine of the corporation either on the loss or gained occasioned by the illegality.<sup>196</sup> Alternatively, one might base a fine on the severity of the crime with a multiplier of the number of executives involved or the size of the gain in the illegality. However, Glasbeek is critical of using a multiplier of the illegal gain as a basis of calculating fines claiming that, 'If used, this calculus would lead to the imposition of enormous penalties, frequently in excess of the assets of the deviant corporation.'<sup>197</sup> Nonetheless as Hills argues, 'If the only legitimate consideration is corporate profitability ..the use of cost benefit analysis provides an impersonal and economically rational tool to help shape corporate decision-making.'<sup>198</sup>

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<sup>188</sup> Coffee, n. 68 at p. 387

<sup>189</sup> Morris, n. 153 at p. 424

<sup>190</sup> Kennedy, n. 51 at p. 450

<sup>191</sup> Goff and Reasons, n. 5 at p. 123; Lemkin calls for greater judicial discretion in calculating fines for environmental offences. In America under the Sentencing Commission's guidelines fines can be reduced by 95% or increased by 400% according to the corporations culpability. (Lemkin, n. 141 at p. 309); see also Wells, n. 130 at p. 18

<sup>192</sup> Bergman, n. 70 at p. 1312

<sup>193</sup> Gruner, n. 145 at p. 29

<sup>194</sup> Coffee, n. 68 at p. 390; Fisse, n. 116 at p. 1218

<sup>195</sup> M. A. Cohen, 'Corporate Crime And Punishment: A Study Of Social Harm And Sentencing Practice In The Federal Courts, 1984-1987' 1989 26 American Criminal L. R. 605 at p. 618

<sup>196</sup> M. B. Bixby, 'Was It An Accident Or Murder? New Thrusts In Corporate Criminal Liability' 1990 41 Labour L. J. 417-423 at p. 422

<sup>197</sup> Glasbeek, n. 59 at p. 136

<sup>198</sup> S L. Hills, *Corporate Violence: Injury And Death For Profit*, (1987), at p. 200

Fisse expresses unease at the usage of the fine as the sole sanction in punishing corporate crime on the basis that it is 'flat earth' thinking to suppose that the range of options begins and ends with fines.<sup>199</sup> His principle concerns about fines are that they convey an impression of ability to purchase crime at a price;<sup>200</sup> their incongruence with deterrence;<sup>201</sup> and his belief that they cannot bring about catalytic deterrence.<sup>202</sup> There is no guarantee that the company will take self-regulatory or internal action.<sup>203</sup> The courts are unwilling to set fines high enough and, even if they did, some companies could not pay if they were set high enough to deter.<sup>204</sup> Fines are 'a monetary threat which is not well tuned to the non-financial values that partly govern organizational decision-making.'<sup>205</sup> Importantly, sub-unit goals and personnel goals may differ from the organisational goal of profit-making.<sup>206</sup> As we have noted earlier in this chapter, fines may also create an overspill problem.<sup>207</sup> Coffee claims 'when the corporation catches a cold, someone else sneezes.'

Coffee's principal criticism is that the 'cash fine system chiefly functions in the case of corporations as a kind of public morality tax, but not a deterrent threat. Alternative sanctions are desperately required.'<sup>208</sup> The search for those alternatives should not obscure the fact that in appropriate circumstances the fine is an extremely useful sanction.

### **Equity Fines**

As an alternative, and in response to some of the more serious criticisms of fines as a sanction, Coffee proffers the equity fine where the response is to issue more shares in the corporation either to those harmed by the corporation's wrongdoing,

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<sup>199</sup> Fisse, n. 116 at p. 1243

<sup>200</sup> Fisse, n. 116 at p. 1217

<sup>201</sup> Fisse, n. 116 at p. 1216

<sup>202</sup> Fisse, n. 116 at p. 1217

<sup>203</sup> Fisse in Fisse and French (Eds.), n. 4 at p. 138

<sup>204</sup> Fisse in Fisse and French (Eds.), n. 4 at p. 139; see also Coffee, n. 68 at p. 390

<sup>205</sup> Fisse in Fisse and French (Eds.), n. 4 at p. 139.

<sup>206</sup> Fisse in Fisse and French (Eds.), n. 4 at p. 140.

<sup>207</sup> Coffee, n. 68 at pp. 405-7.

<sup>208</sup> Coffee, n. 68 at p. 407.

to the State, or to some other organisation.<sup>209</sup> His rationale is *inter alia* that this reduces (1) the overspill problem (2) the nullification problem may be reduced as the latent threat of fines to the employees and the community dependant on the corporation is no longer present (3) much higher penalties can be imposed (4) the manager's interest is better aligned with the corporation. Coffee notes the impact that equity fines have on the unjust enrichment of the corporation but no matter how much the corporation gains from its illegal activities they flow to the new stockholders *pro rata*.<sup>210</sup> This might be of double importance in respect of a new fledgling corporation because the equity fine targets future earnings.<sup>211</sup> The equity fine might also permit the appointment of new directors but Coffee expresses some scepticism as to the particular benefits of this.<sup>212</sup>

Kennedy supports Coffee's idea of equity fines arguing that 'Even a small equity fine could in some circumstances significantly alter the balance of control within an enterprise.'<sup>213</sup> The infusion of new blood into the ownership of the company may reap significant rewards. One of the beneficial features of the equity fine is that it will dilute the stock options held by directors. Another option discussed by Kennedy is the pass through fine where each shareholder pays a pro-rata proportion of any fine levied against the corporation. Shareholders could sell part of their holding to raise their part of the fine.<sup>214</sup> The great advantage is the lack of damage to the corporation and its workforce; there is no loss of jobs and no diminution of the share value. Such a sanction can be applied to fall on shareholders at the time of the violation rather than the existing shareholders who pay cash or equity fines.<sup>215</sup> Kennedy perceives that disgruntled shareholders are likely to exert influence on managers thus promoting private policing of corporate crime. Of course, such a system has significant logistical problems especially amongst small shareholders. Corporate managers may try to mollify shareholders by declaring

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<sup>209</sup> Coffee, n. 68; see also Glasbeek, n. 59 at p. 136

<sup>210</sup> Coffee, n. 68 at p. 419

<sup>211</sup> Coffee, n. 68 at p. 420

<sup>212</sup> Coffee, n. 68 at p. 421

<sup>213</sup> Kennedy, n. 51 at p. 466

<sup>214</sup> Kennedy, n. 51 at pp. 468-9

<sup>215</sup> Kennedy, n. 51 at p. 470

special dividend to cover losses.<sup>216</sup> Kennedy's final suggestion is for superadded liability which breaks through the wealth barrier of the corporation. If the corporation cannot pay the fine then the shareholders pay in proportion to their shareholding the difference. Kennedy argues that,

'Limited liability operates very differently in the context of criminal fines. The criminal fine is not fundamentally a compensatory payment. It is rather a mechanism for the prevention of undesirable conduct. Where limited liability blocks the operation of fine, there is no reallocation of a compensatory insurance burden.'<sup>217</sup>

Superadded liability would naturally prove more significant for institutional and larger shareholders. Would this approach inhibit investment ? Kennedy suggests an insurance scheme for those investors who do not participate in management of the company.<sup>218</sup>

All of these schemes suffer from the basic problem that allocation of a penalty via corporate equity is problematic because corporate equity is manipulable.<sup>219</sup> However, the benefit is that this type of fine could be tuned to create a statutory list of beneficiaries.<sup>220</sup> Its single greatest advantage is that it raises the upper limit of the punishment and could prove,

'Useful as punitive stock dilution orders would be as a means of outflanking the deterrence trap, standing alone they could not be expected to overcome the other major limitations of fines or monetary penalties against corporations (namely circumvention of individual accountability, lack of congruence with non-financial values in organizational decision-making, and non-assurance of organizational reform).'<sup>221</sup>

#### 4.6 Imprisonment

One of the oft quoted reasons for a denial of the efficacy and propriety of corporate criminal liability is the inability to punish the corporation in the way that an individual can be punished. No where is this more evident than in the context of

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<sup>216</sup> Kennedy, n. 51 at p. 471

<sup>217</sup> Kennedy, n. 51 at p. 474

<sup>218</sup> Kennedy, n. 51 at p. 477

<sup>219</sup> Kennedy, n. 51 at p. 478

<sup>220</sup> Fisse in Fisse and French (Eds.), n. 4 at p. 141

<sup>221</sup> Fisse in Fisse and French (Eds.), n. 4 at p. 143

the sanction of imprisonment.<sup>222</sup> There are those theorists who believe that even were imprisonment possible it is neither the most appropriate or efficacious sanction to impose upon the corporation. Conversely, there are those who believe that the corporations' liberty may be infringed in a way that imprisonment imposes an analogous burden on the individual.<sup>223</sup> As outlined earlier Posner expounds a free market economist perspective which supports the imposition of fines as the optimum penalty for corporate crime.<sup>224</sup> Deterrence in Coffee's view is only achieved where the 'expected punishment cost' exceeds the 'expected gain.'<sup>225</sup> Coffee is hostile to Posner's approach arguing that imprisonment is a greater deterrent than a fine in absolute terms and that no amount of adjustment of the penalty can offset the threat of going to jail.<sup>226</sup> Spiegelhoff represents the schism between Coffee and Posner as illustrating the need for a mixed system of sanctions which calls for individual sanctions for individuals and corporate sanctions for the corporation.<sup>227</sup>

One solution might be to replicate the essence of imprisonment of the individual and seek to apply that to the corporation. That replication may come in the form of civil restraint. Frankel suggests that civil restraint is likely to be a sanction of ever increasing importance.<sup>228</sup> Whether that will be so in respect of corporations remains debatable. There is the fundamental problem of balancing the need for corporate freedom with the needs of society to prevent the corporations from engaging in certain harmful activities. Where they prove incapable of doing so, some form of restraint may prove to be a suitable and appropriate penalty. That

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<sup>222</sup> In *Pharmaceutical Society v London and Provincial Supply Association* (1880) 5 App Cas 857 (at p869) Lord Blackburn said 'I quite agree that a corporation cannot in one senses, commit a crime- a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death, if that be the punishment for the crime; and so, in those senses, a corporation cannot commit a crime'; cf. *R v Daily Mirror Newspapers Ltd.* [1922] 2 KB 530 at p 540; *R v Ascanio Puck Ltd.* 29 TLR 11; *Suttons Hospital Case* 77 ER 937

<sup>223</sup> In *US v Allegheny Bottling Co.* 695 F Supp 856 (E D Va 1988) it was held that corporation could be 'imprisoned' and argued that all that was necessary was restraint and immobilisation

<sup>224</sup> Posner, n. 168

<sup>225</sup> Coffee, n. 68 at p. 389; see also Smith, n. 68 at p. 15

<sup>226</sup> Coffee, n. 68 at p. 423.

<sup>227</sup> Spiegelhoff, '*Limits On Individual Accountability For Corporate Crimes*' 1984 67 Marquette L. R. 604-640 at p. 634.

<sup>228</sup> Frankel, '*Preventative Restraints And Just Compensation: Towards A Sanction Law Of The Future*' 1968 78 Yale L. J. 229 at p. 330.



restraint may have geographic, or temporal dimension or simply be related to activities hitherto engaged in by the corporation. Certain other sanctions discussed under para 4.8 below might, because of the restrictions they place on the corporation, also be analogous to imprisonment. Our motivation should be to develop efficient and effective sanctions applicable to the corporate form. Civil restraint might well be part of such a framework. Its resemblance to imprisonment of the individual is, in that context, merely coincidental.

#### **4.7 Corporation Dissolution**

Whilst it smacks of the preoccupation with individualism noted by many commentators, there has been an attempt to equate other individual sanctions with practical possibilities for the corporate form. One imagines that the death penalty, possible for individuals, may have eluded such attempts. However, in many respects it remains one of the easier punishments to replicate in respect of the corporate form; corporate dissolution readily stands comparison. Lederman offers support for the concept of corporate liquidation arguing that 'There is no justification for the existence of a corporation which operates and advances its business goals by way of regular and frequent criminal activity.'<sup>229</sup> However, she sees such a step being taken after individual perpetrators have been prosecuted. Lederman describes dissolution as the 'most extreme preventative measure available.'<sup>230</sup> Dissolution may of course be problematic in that shareholders may reconstitute the company under a different guise following dissolution.<sup>231</sup> It may not be nearly as effective as preventing the company and its officers from carrying on illegal activities.<sup>232</sup> One way round the problem of reconstitution is might be to disqualify shareholders from reconstituting but this inevitably would be fraught with difficulties. Rafalko proposes 'corporate beheading'<sup>233</sup> entailing a complete reorganisation of the corporate decision making apparatus and the dissolution of shareholders stock for all shareholders who possess more than one percent of the

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<sup>229</sup> Lederman, n. 42 at p. 323

<sup>230</sup> Lederman, n. 42 at p. 334

<sup>231</sup> Lederman, n. 42 at p. 335

<sup>232</sup> Fisse, n. 182 at p. 252

<sup>233</sup> R. J. Rafalko, 'Corporate Punishment: A Proposal' 1989 8 Journal of Business Ethics 917-928 at p. 925

stock with this stock turned over to the employees.<sup>234</sup> Dissolution therefore has considerable appeal as the ultimate sanction. We must reserve the right to dissolve the corporation where its conduct is so reprehensible or its structures prove incapable of reform. We do no less for less serious reasons in the realms of company law and indeed, voluntary reconstruction or reconstitution are often resorted to. Any system of State induced dissolution must entail the safeguard against reconstitution under a different guise. Perhaps one solution is to impose individual criminal liability on anyone who attempts to reconstitute a dissolved corporation in an attempt to circumvent the court ordered dissolution.

#### 4.8 Forfeiture And Other Sanctions

Forfeiture is another potential sanction against corporate criminals. Lederman argues for supplementary sanctions against the corporation including forfeiture of profits. She describes this as a convergence of the criminal law and the law of torts and justifiable on the principle of 'restoration.'<sup>235</sup> One note of caution is that 'In using forfeiture as an instrument to abrogate illegal profits care should be taken not to affect the rights of the parties from whom the profits or goods were illegally acquired. The power of forfeiture should be constrained in circumstances where the original owner requests return of what has been appropriated from him, or its equivalent.'<sup>236</sup>

Stone groups certain sanctions under the heading of other 'authoritative deprivations'-ineligibility to receive public funds, the loss of accreditation, licence, or charter.<sup>237</sup> These strategies naturally operate *ex-post facto*. Yoder also canvasses other corporate punishments including corporate quarantine. One problem with that is that it fails to protect contractual and other obligations to innocent third parties.<sup>238</sup> Fisse offers the idea of corporate preventive orders.<sup>239</sup> Such an order is known in health and safety law but not as a widespread general

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<sup>234</sup> Rafalko, n. 233 at p. 926

<sup>235</sup> Lederman, n. 42 at p. 332

<sup>236</sup> Lederman, n. 42 at p. 334

<sup>237</sup> Stone, n. 11 at p. 1452

<sup>238</sup> Yoder, n. 181 at p. 54

<sup>239</sup> Fisse, n. 182 at p. 266 et seq.

order. An order would be akin to an injunction or interdict. He envisages preventive reports being laid before the courts before the order is made and the order to be the subject of regulatory enforcement. Fisse also argues for publication of the making of such orders.<sup>240</sup> A corporation would be the subject of a preventive order when there was a likelihood of the offence being committed in the future. According to Fisse, likelihood implies no fixed degree of risk. It will be a variable factor according to the magnitude of potential harm. Breach of preventive orders would attach individual and corporate criminal responsibility.<sup>241</sup> However, restricting a corporation's sphere of activity is in the view of Lederman 'a drastic measure that should be used rarely.'<sup>242</sup>

Divestiture is another possibility in the search for new innovative sanctions.<sup>243</sup> Public ownership might be yet another means of controlling corporate crime. However, corporate crime might be as prevalent in public enterprises as it is in private enterprises. It would simply be fallacious to believe that public ownership would ensure social responsibility.

The utilisation of such non-legal 'sanctions' has been emphasised by Charny.<sup>244</sup> Coffee also believes that a mixed system of legal and non-legal sanctions is to be preferred.<sup>245</sup> Coffee's suggestion is an arbitrage capacity in the Free Market approach to sentencing. Coffee's model suggests that the convicted offender might be asked prior to sentencing as to his monetary trade off against particular periods of imprisonment or alternatively, once sentence is revealed be invited to make a bid against that jail sentence. Coffee responds to the argument that his suggestion smacks of purchasing justice by saying that fines could be paid in instalments and as such no offender would be excluded from the system on the basis of wealth. Additional information might be available to the court on the corporations wealth and liabilities and verified in a pre-sentence report. The level of the buy-sell price

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<sup>240</sup> Fisse, n. 182 at p. 269

<sup>241</sup> Fisse, n. 182 at p. 272

<sup>242</sup> Lederman, n. 42 at p. 335

<sup>243</sup> M. Clinard, *Illegal Corporate Behaviour*, (1979) at p. 219

<sup>244</sup> D. Charny, 'Non-Legal Sanction In Commercial Relationships' 1990 Harvard L. R. 375-467

<sup>245</sup> Coffee, n. 165 at p. 449

of incarceration might be set by a wealthy corporation ensuring that wealthier convicts evade jail more often. The courts could be instructed to incarcerate in a specified number of cases for each crime category to create a competitive market motivating offenders to bid higher to realise greater sums which in turn could fund compensation schemes.<sup>246</sup>

All of the foregoing ideas do not exhaust the possible options. Confiscation orders may also be viewed as an individual or general deterrent.<sup>247</sup> In addition there is support for turning company operations over to a court appointed trustee to sell or reorganise company assets as necessary.<sup>248</sup> Paehlke offers various tools to lessen environmental crime- taxes, subsidies, removal of subsidies, governmental procurement, bans on substances, and nationalisation.<sup>249</sup> Whilst Geis offers the suggestion that large companies should have public ombudsman placed in their offices.<sup>250</sup> Further possibilities include court ordered community medical care, depositing of money in employee benefits plan and community service.<sup>251</sup> Such charitable contributions might be viewed as a means of restitution to the community. Many of these ideas are not just imaginative possibilities; occasionally the American courts have been prepared to adopt such strategies.<sup>252</sup> According to Simpson and Koper, white-collar offenders are believed to be more sensitive to informal sanctions than conventional offenders.<sup>253</sup> The downside might be the taxable gain and enhancement of prestige of the corporation. There is also the possibility of the punitive injunction which 'could be used not only to require a corporate defendant to revamp its internal controls but also to do so in

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<sup>246</sup> Coffee, n. 165 at p. 451- little wonder Coffee himself said 'panaceas are rare..and the dangers that lurk in this proposal remain serious.'

<sup>247</sup> Levi, n. 83 at p. 218

<sup>248</sup> J. Zaia, 'Government Must Punish Corporate Polluters' 1989 109 *The Teach* 5

<sup>249</sup> Paehlke in Pearce and Snider (Eds.), n. 48 at p. 312

<sup>250</sup> Geis in Ermann and Lundman (Eds.), n. 58 at p. 290

<sup>251</sup> Cohen, n. 195 at p. 611

<sup>252</sup> In *US v Mitsubishi International Corp.* 677 F2d 785 (9th Cir 1982) the company were required to provide the services of an executive to a charitable organisation to develop an ex-offender programme. In *US v Danilow Pastry Co.* 563 F Supp 1159 (s D NY 1983), the defendant firm was required to donate bread to organisations for the needy (quoted in Levitske, n. 331 at p. 787).

<sup>253</sup> Simpson and Koper, 'Deterring Corporate Crime' 1992 30 *Criminology* 347-369 at p. 347; An example of punishment in I G Farben (Hills, n. 198 at p. 188) was that the directors were not to be appointed to directorships in the newly constituted companies. The company was forcibly broken up. The Executives were quickly restored to their positions on release from prison.

some punitively demanding way. Instead of requiring a defendant merely to remedy the situation by introducing state of the art preventative equipment or procedures, it would be possible to insist on the development of innovative techniques. The punitive injunction could thus serve as both punishment and super-remedy.<sup>254</sup>

Many believe (usually those hostile to corporate criminal liability) that corporations can be adequately punished by means of civil penalties. The reasons for adoption of such a position are various. In respect of certain of the economic crimes there is the perceived problem of moral neutrality.<sup>255</sup> The viewpoint is not just confined to executives; it may also be endemic in the judiciary and of course Sutherland himself viewed the public's moral neutrality as predicated on the complexity of the crimes being committed, their novelty and their diffuse effects.<sup>256</sup> Because of the absence of a moral consensus viewpoint many question whether the criminal law is the correct vehicle for social change.<sup>257</sup> The overuse of criminal sanctions may 'dull any moral stigma' of the penalty and at the same time have a detrimental effect on public indignation of the conduct.<sup>258</sup> Sutherland asserts that while civil penalties may be severe they do not carry the stigma that criminal penalties do.<sup>259</sup> Yoder identifies five advantages to civil penalties - pleading requirements are simpler, no delay in process because of failure to appear, a relaxation of the burden of proof, the right of jury trial is avoided and the right of state appeal if the case is lost.<sup>260</sup> Yoder argues that it is in part the credibility of the sanction itself which is the factor which explains the continued rise in corporate crime despite the potential of sanctions to deter such wrongdoing.<sup>261</sup> That credibility is undermined by the absence of belief of the likelihood that the corporate offender will be detected and apprehended and moreover, if he is

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<sup>254</sup> Fisse, n. 65 at p. 501

<sup>255</sup> Yoder, n. 181 at p. 42

<sup>256</sup> See Yoder, n. 181 at p. 42

<sup>257</sup> Yoder, n. 181 at p. 43

<sup>258</sup> Yoder, n. 181 at p. 43

<sup>259</sup> Sutherland in Geis and Meir (Eds.), *White Collar Crime*, (1977) at pp. 266-7; Hart, 'The Aims Of The Criminal Law' 23 *Law and Contemp Prob.* 401 at pp. 404-5

<sup>260</sup> Yoder, n. 181 at p. 43

<sup>261</sup> Yoder, n. 181 at p. 46



apprehended, there is an absence of belief that the punishment will be serious. In this way both specific and general deterrence are undermined. The designation of something criminal can develop common consciousness and morality.<sup>262</sup> Also of importance is the fact that criminal liability may be significant in establishing civil liability.<sup>263</sup> Correspondingly, Yoder claims that the media 'de-emphasise' white collar crime and as such the educational theory of criminal punishment is undermined. Attempts to instil a greater sense of morality from publicised prosecutions depends on the approach of the media.<sup>264</sup> There has also been criticism of enforcement in the development of attitudes. Freiberg, for example, offers extensive criticism of civil regulation of taxation violations in Australia. She says that,

'the non-enforcement of the law, together with the use of civil rather than criminal penalties has, until recently, allowed the taxation system to decay and fall into disrepute. Further by allowing major illegalities to go unsanctioned, enforcement authorities allowed the development of an endemic cynicism and general disrespect for the law that may take years to dispel.'<sup>265</sup>

One of the advantages in imposing civil penalties is the reduction of the burden of proof<sup>266</sup> and the consequently smaller amount of resources required for successful litigation.<sup>267</sup> It has been suggested that administrative enforcement 'takes place partly because criminal sanctions drag with them all the traditional safeguards surrounding the defendant.'<sup>268</sup> Braithwaite also expresses frustration at the exacting standards of criminal punishment.<sup>269</sup> Khanna has suggested an intermediate standard might be appropriate.<sup>270</sup> In the view of the writer to move

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<sup>262</sup> Swigert and Farrell, 'Corporate Homicide: Definitional Processes In The Creation Of Deviance' 1980 15 Law and Society Review 161-182 at p. 179; Sutherland, n. 25 c.f. Durkheim 1904, 65-73

<sup>263</sup> Fisse, n. 66 at p. 405; Note, 'The Use Of Criminal Judgements As Evidence In Civil Cases' 1975 10 Israel L. R. 242

<sup>264</sup> Yoder, n. 181 at p. 47

<sup>265</sup> Freiberg, 'Enforcement Discretion And Taxation Offences' 1986 3 Australian Tax Forum 55-59 at p. 59

<sup>266</sup> See Radin, n. 58 at p. 64

<sup>267</sup> Smith, n. 68 at p. 15

<sup>268</sup> H. Ball and L. Freidman, 'The Use Of Criminal Sanctions In The Enforcement Of Economic Legislation: A Sociological View' 1965 17 Stanford L. R. 197-223 at p. 214

<sup>269</sup> Braithwaite, n. 7 at p. 306

<sup>270</sup> Khanna 'Corporate Criminal Liability: What Purpose Does It Serve ?' 1996 109 Harvard Law Review 1477-1534 at p. 1516

towards differential standards of criminal proof would occasion some violence to the principled basis on which the case for corporate criminal liability exists.

Criminal prosecution is often seen as the pinnacle of enforcement,<sup>271</sup> whereas regulatory laws are not primarily concerned with values but are predicated on results and compliance.<sup>272</sup> Sentencing of regulatory offences can often destroy the deterrent effect of the law; courts uniformly impose small fines; employers view the fine as cheaper than undertaking remedial action. So much so that one commentator has been moved to describe the prosecution of regulatory crime as 'needlessly wasting taxpayer money in an expensive charade.'<sup>273</sup> However the non-utilisation of the criminal sanction calls into question the credibility of the criminal law.<sup>274</sup> My thesis does not seek to undermine criminal sanctions by arguing for civil penalties. That simply smacks of an exercise in minimalisation of the significance of the criminality. Many of the interesting alternative sanctions canvassed within this section illustrate that we can develop a more varied strategy without lessening the import of corporate crime.

#### 4.9 Publicity As A Sanction

Publicity may have an important role not only in the detection and deterrence of crime but, also in the punishment of it.<sup>275</sup> One can 'utilize the visual and media capabilities of the society to heighten the awareness in the offending individual or corporation as well as the community at large, of a serious discrepancy between actual behaviour and the identity or image thought to be possessed or projected.'<sup>276</sup> However, to effectively use publicity as a sanction there must be corporate ideal

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<sup>271</sup> Smith, n. 68 at p. 13

<sup>272</sup> See chapter 1 of this thesis

<sup>273</sup> E. R. Schachter, *Enforcing Air Pollution Controls*, (1974), at p. 48

<sup>274</sup> See Kovel, n. 87 at p. 154

<sup>275</sup> *In US v Hospital Monteflores Inc.* 575 F 2d 332 at 335 (1st Cir 1978), Judge Coffin argued that, 'It is true that corporations do not have human emotions, but that does not mean that they do not 'suffer' during criminal trials in the sense of experiencing the harm to a legitimate protectable interest...A corporation that falls out of favor with society will suffer. Its suffering may be of a different character than an individual's but that does not make those sufferings any less real or hazardous. Corporations can be made very insecure by prolonged periods of bad publicity.'

<sup>276</sup> French in Fisse and French (Eds.), n. 4 at p. 163

models.<sup>277</sup> Pulitzer has argued that, 'Publicity may not be the only thing that is needed but it is the one thing without which all other agencies will fail.'<sup>278</sup>

Publicity has long been recognised as a potential sanction against the corporate wrongdoer. Khanna contends stigma is the most powerful sanction that society can impose on a corporation.<sup>279</sup> Fisse and Braithwaite claim that 'it is fanciful to suggest that corporate entities inherently lack the capacity to be stigmatised because they are fictitious beings.'<sup>280</sup> Image is at the heart of modern corporate life.<sup>281</sup> Corporations it seems are more likely to respond positively to repair their images than individuals.<sup>282</sup> Formal publicity sanctions have the prestige of law and on that basis have more credibility.<sup>283</sup> Reputational sanctions as applied to the corporation are two dimensional- loss of business and sense of shame.<sup>284</sup> However, there is a view that reputational sanctions may be inaccurate and affect only firms with good reputations.<sup>285</sup>

Conviction itself often may result in adverse publicity<sup>286</sup> and that may be a penalty in itself.<sup>287</sup> That form of publicity is however haphazard and inconsistent; arguably limited press coverage of corporate crime generally justifies publicity as a formal sanction.<sup>288</sup> Publicity may be used as advice to inflict monetary loss or to restrict capital acquisition to prevent expansion<sup>289</sup> but, as Fisse himself recognises,

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<sup>277</sup> French, in Fisse and French (Eds.), n. 4 at p. 165

<sup>278</sup> Pulitzer quoted in Fisse and Braithwaite, *The Impact Of Publicity On Corporate Offenders* (1983) at p. 1

<sup>279</sup> Khanna, n. 270 at p. 1499

<sup>280</sup> Fisse and Braithwaite, n. 278 at p. 289; see also Fisse, n. 116 at p. 1153

<sup>281</sup> French, in Fisse and French (Eds.), n. 4 at p. 164; D. T. Risser, 'Punishing Corporations: A Proposal' 1989 8 Business and Professional Ethics Journal 83-92 at p. 83

<sup>282</sup> Fisse, n. 116 at p. 1154

<sup>283</sup> Fisse and Braithwaite, n. 278 at p. 298

<sup>284</sup> 'To feel shame or to be shameful a person must come to regard one's behaviour as having fallen below or short of what is expected of or associated with the role, station or type to which one belongs. The feeling of shame is the feeling of inadequacy or inferiority' (French in Fisse and French (Eds.), n. 4 at p. 162).

<sup>285</sup> Khanna, n. 270 at p. 1508

<sup>286</sup> Weinfeld, 'Criminal Liability Of Corporate Managers For Deaths Of Their Employees: People v Warner-Lambert Co.' 1982 Albany Law Rev 655-685 at p. 674

<sup>287</sup> Sutherland, n. 25 at p. 71; Renfrew, n. 77 at p. 593

<sup>288</sup> Fisse and Braithwaite, n. 278 at p. 179

<sup>289</sup> See Fisse, 'The Use Of Publicity As A Sanction Against The Business Corporation' 1971 8 Melbourne University L R 107 at p. 117

‘there is much more to the notions of prestige and respect than financial standing. Even the wealthy may wilt from social disapproval.’<sup>290</sup> Ancillary benefits of publicity as a sanction may be many. Publicity may prompt government intervention in the form of formal enquiries, regulatory investigation, black listing for government grants or contracts. Publicity may be used to warn consumers, investors, public and employees.<sup>291</sup> Publicity may exert ‘pressures which thrust in the direction of reformation or restructuring,’ though such a consequence may be fortuitous.<sup>292</sup> One incidental benefit of greater exposure is the acclimatisation of juries (and the public generally) to this type of crime.<sup>293</sup>

Fisse and Braithwaite categorise the various doubts over using publicity as a sanction against corporations as (1) corporations cannot be stigmatised (2) there are formidable problems in relation to formulation, transmission and influence of the message (3) there may be resort to counter-publicity or other self-protective tactics (4) serious offences will attract publicity anyway (5) it may be more effective to rely on preventative orders and other interventionist orders (6) it is better to tackle individuals within corporation (7) inducing non-purchase is difficult (8) adverse affects are bought at the cost of spillover and distortion (9) it is too uncertain for just deserts.<sup>294</sup>

French offers the idea of the ‘Hester Prynne Sanction’<sup>295</sup> as a formalised publicity sanction described as consisting,

‘largely of an institutionalized psychological punishment administered to a corporation found guilty of wrongdoing. It takes the form of a court ordered adverse publication of the corporation the cost of which is paid by the guilty corporation. The aim of the sanction is to create a psychological disposition of shame within the corporation for that of which it is guilty.’<sup>296</sup>

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<sup>290</sup> Fisse, n. 289 at p. 118

<sup>291</sup> Fisse, n. 289 at p. 119

<sup>292</sup> Fisse, n. 289 at p. 149

<sup>293</sup> Fisse and Braithwaite, n. 278 at p. 258

<sup>294</sup> Fisse and Braithwaite, n. 278 at p. 288

<sup>295</sup> Hester Prynne Sanction taken from ‘*The Scarlet Letter*’ by Hawthorne

<sup>296</sup> A. A. Corlett, ‘*French On Corporate Punishment: Some Problems*’ 1988 7 *Journal of Business Ethics* 205-210 at p. 205

A major criticism by Corlett of the Hester Prynne Sanction is that it fails to adequately respond to serious infractions of the criminal law. According to Corlett, the sanction is only effective in respect of minor corporate offences.<sup>297</sup> One of the obvious problems is that the loss of status may lead to the failure of the enterprise thus causing damage to the workforce.<sup>298</sup> Corlett criticises French's assertion that the workforce should not be of concern and argues that to support such a viewpoint there would need to be 'a genuine and significant causal connection between the untoward event and the workforce of the corporation.'<sup>299</sup> Another problem is that the corporation may be able to evade such a sanction by passing on the costs to the consumer or by reconstituting itself. A further problem is a practical one and that is that the sanction relies very heavily on the media. There are obvious defects in such a system particularly given the relationship between the media and many corporations. French's idea of coupling publicity sanctions with community service is similarly criticised by Corlett who offers cynicism at how the corporation might turn the community service to its advantage (utilising research reports for future gain, good publicity derived from the good works).<sup>300</sup> Coffee's doubts on the Hester Prynne sanction can be summarised on the basis that the Government is a poor propagandist;<sup>301</sup> the message may be lost in the myriad of other adverse corporate criticism; the dilution of the sanction through counter publicity; that the publicity sanction may produce the same externalities as corporate fines; and concern about civil liberties.<sup>302</sup> Moreover, the adverse publicity might be shifted to individual officers.<sup>303</sup> In broader terms Fisse and Braithwaite see it as a mistake to think in terms of broadcasting rather than narrowcasting. Publicity sanctions should be focused and targeted. There is also the problem of 'saturated media unable to offer clear and coherent information.'<sup>304</sup> The overall level of 'anti-corporate noise' might prove problematical in imposing

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<sup>297</sup> Corlett, n. 296 at p. 207

<sup>298</sup> Corlett, n. 296 at p. 206

<sup>299</sup> Corlett, n. 296 at p. 206

<sup>300</sup> Corlett, n. 296 at p. 208

<sup>301</sup> See also Fisse and French (Eds.), n. 4 at p. 166

<sup>302</sup> Coffee, n. 165 at pp. 424-8

<sup>303</sup> Coffee, n. 165 at p. 429

<sup>304</sup> Fisse and Braithwaite, n. 278 at p. 294



publicity sanctions.<sup>305</sup> Fisse and Braithwaite contend that, 'If a publicity sanction is used for the purpose of lowering prestige or inducing governmental intervention..the relevant targets are persons particularly capable of distinguishing a deep hiss from a light crackle or pop.'<sup>306</sup>

French's idea is, of course, predicated on the notion that the corporation can feel shame. In response Corlett poses the question,

'what if it has little or no capacity for such a feeling under any circumstance ? What if, moreover, the corporation is perfectly willing to delude the courts, media and public into thinking that it is shameful about doing a wrongful deed, but in fact places more emphasis on profit -making than on moral practices in business? What if a guilty corporation is perfectly willing to undergo the Hester Prynne sanction so long as it does not interfere with significant profit making ?....'nothing in French's view of the use of the Hester Prynne Sanction against guilty corporations ensures against the following (1) The unjust immiseration of the guilty corporation's work force;(2) The ability of the guilty corporation to escape the financial penalty of the sanction by raising its prices fro the consumer;(3) The ability of the guilty corporation to reorganize itself and thereby escape the public shame of the sanction;(4) The possibility of the media's ineffectiveness in carrying out the sanction;(5) The limited scope of the sanction on those corporations guilty of gross forms of wrongdoing;(6) The guilty corporation's ability to control the findings and operations of its court appointed research facility;(7) The hypocritical nature of the sanction;(8) The possibility that some corporations will not feel shameful about their wrongful deeds.'<sup>307</sup>

Risser also recognises one of the problems of publicity sanctions is that they are not preventive in nature and the 'Hester Prynne Sanction' 'does not provide for cases in which corporations are not able or willing to voluntarily make the structural changes necessary to improve their behaviour.'<sup>308</sup> However, Fisse and Braithwaite are clear that publicity sanctions must be remedial as well as punitive.<sup>309</sup> Another major problem with publicity sanctions is the fact that they can be costly with no guarantee of success.<sup>310</sup>

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<sup>305</sup> Fisse and French (Eds.), n. 4 at p. 166

<sup>306</sup> Fisse and Braithwaite, n. 278 at p. 295.

<sup>307</sup> Corlett, n. 296 at p. 209

<sup>308</sup> Risser, n. 281 at p. 84

<sup>309</sup> Fisse and Braithwaite, n. 278 at p. 313

<sup>310</sup> Fisse and Braithwaite, n. 278 at p 313

Like much of the debate on corporate criminal liability, there is a division of opinion as to whether publicity as a formal sanction actually works. Leigh is against publicity sanctions other than for regulatory offences.<sup>311</sup> Renfrew similarly opposes sanctions purely based on publicity.<sup>312</sup> Stoner meanwhile believes the deterrent effect of negative publicity is highly questionable.<sup>313</sup> According to Wragg, stigmatisation falls upon individuals within the corporation, not the corporation itself.<sup>314</sup> Fisse in contrast views publicity sanctions as an added weapon. According to him, publicity may offer some hope for improving the array of sanctions available against corporate offenders.<sup>315</sup> Overspill of the sanction from the corporation to employees may of course be beneficial and present one method of reforming individual conduct where prosecution of the individual proves difficult.<sup>316</sup> Fisse almost countenances a differential publicity sanction aimed at the educated audience -corporate executives and a special form of sanction for the general public.<sup>317</sup> The supposition is that there is a need to create a culture where corporate crime is not tolerated and that this may be achieved through publicity.<sup>318</sup>

Fisse makes three suggestions as to how publicity sanctions may be effected- mass media adverts, compulsory notification to shareholders and others through the annual report or, a temporary ban on advertising.<sup>319</sup> The sanction would only be operative following determination by a court or administrative body. In other words it would be a formal sanction.<sup>320</sup> Account should be taken of the informal publicity sanction in determining the formal sanction.<sup>321</sup>

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<sup>311</sup> Leigh, n. 55 at pp. 159-60

<sup>312</sup> Renfrew, n. 77 at p. 594

<sup>313</sup> Stoner, n. 112 at p. 1291

<sup>314</sup> S. J. Wragg, *'Corporate Homicide: Will Michigan Follow Suit'* 1984 62 University of Detroit L. R. 65-85 at p. 81

<sup>315</sup> Fisse and Braithwaite, n. 278 at p. 2

<sup>316</sup> Fisse, n. 289 at p. 120

<sup>317</sup> Fisse, n. 289 at p. 147

<sup>318</sup> Fisse and Braithwaite, n. 278 at p. 246

<sup>319</sup> Fisse, n. 289 at p. 108

<sup>320</sup> Fisse, n. 289 at p. 109

<sup>321</sup> Fisse, n. 289 at p. 109.

Much of the modern media is owned by large corporations so it will be difficult to galvanise them against corporations<sup>322</sup> If not owned by large corporations, they nonetheless depend on advertising revenue from them. Other problems in utilising private media is that they do not view moderate transgressions of the law as important news. For the media a greater danger of defamation actions exist and this may influence their approach. Publication in official newspapers is problematic because of their anodyne format and limited audience.<sup>323</sup>

Fisse foresees that publicity as a formal sanction is more likely to be directed at the large endocratic organisation.<sup>324</sup> Publicity may target individuals in the company or it may target products. However, a general attack may be unfair. Publicity sanctions will require to be measured and proportionate. What about companies associated with one brand ? e.g. Marks and Spencer's.<sup>325</sup> Where the publicity sanction serves as a warning to consumers, it should closely relate to the matters of the offence.<sup>326</sup> Where publicity attempts to persuade the consumer to inflict a monetary sanction on the offender corporation it may be difficult to control. There may be counter-publicity; and it may be difficult to dislodge the high esteem of the product. Moreover, corporations may seek to redefine their conduct in more benign terms.<sup>327</sup> Persuasion may prove problematic because it is confronted with problems of understanding amongst the general populace.<sup>328</sup> A ban on responsive advertising reduces a product or company's competitive influence and diminishes the problem of favourable characteristics of that product or corporation.<sup>329</sup> Moreover, adverse publicity may be counter-productive where the corporation has in the eyes of the public made attempts to avert the incident; many offences are simply not of popular concern to the public.<sup>330</sup> The formal publicity sanction may be avoided by dissolution change of location, name change, change of name of

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<sup>322</sup> Snider, n. 87 at p. 160

<sup>323</sup> Fisse, n. 289 at p. 147

<sup>324</sup> Fisse, n. 289 at p. 110

<sup>325</sup> Fisse, n. 289 at p. 121

<sup>326</sup> Fisse, n. 289 at p. 125

<sup>327</sup> Geis in Ermann and Lundman (Eds.), n. 58 at p. 383

<sup>328</sup> Fisse, n. 289 at p. 126

<sup>329</sup> See Fisse, n. 289 at p. 128

<sup>330</sup> Fisse, n. 289 at p. 131

products, product diversification, take-over, or counter-publicity.<sup>331</sup> In respect of counter-publicity corporations have an advantage over State agencies in that their methods of persuasion may be stronger.<sup>332</sup> They may use simple emotive slogans.<sup>333</sup> There might also be advance counter-publicity,<sup>334</sup> though the formal publicity sanction may seek to prevent such counter-publicity (for example an advertising ban). For these reasons and others, publicity as a sanction may also be criticised on the grounds of uncertainty because 'sentence is determined by the capricious jury of public or governmental opinion.'<sup>335</sup> Moreover the publicity sanction may not have the desired punitive effect.<sup>336</sup> It is also the case that publicity sanctions do not generate funds for official purposes. In addition it may produce anxiety amongst the workforce or the wider community.<sup>337</sup> Other problems associated with publicity as a sanction are the commonly held belief that the impact of publicity is temporary.<sup>338</sup> Widespread use of publicity sanctions may create weariness in the minds of the public on the issue of corporate crime.<sup>339</sup> There is also the possibility that once a company gets into the public eye it may become the target for adverse publicity or 'indiscriminate muckraking.'<sup>340</sup> Indeed, there is empirical evidence that many corporations do not run counter-publicity on the basis of skeletons being uncovered. In addition there may be impacts upon innocent associated entities. e.g. suppliers or innocent competitors in the same field.<sup>341</sup>

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<sup>331</sup> See Fisse, n. 289 at p. 133

<sup>332</sup> Fisse, n. 289 at p. 135

<sup>333</sup> Fisse, n. 289 at p. 136

<sup>334</sup> Fisse, n. 289 at p. 137

<sup>335</sup> Fisse, n. 289 at pp. 139-140

<sup>336</sup> E.g. in *Larner v Power Machinery Party Ltd.* where sales went up 15%.

<sup>337</sup> Fisse, n. 289 at p. 141

<sup>338</sup> Fisse and Braithwaite n. 278 at p. 227

<sup>339</sup> Braithwaite, n. 7 at p. 336

<sup>340</sup> Fisse and Braithwaite, n. 278 at p. 228

<sup>341</sup> See Fisse, n. 289 at p. 142. In the *Kepone* case the judge imposed a penalty of \$13.25m. *Kepone* set up an Endowment the Virginia Environmental Endowment with \$8m and received a corresponding diminution of the fine. It was however tax deductible and engendered good will. *Kepone* decided not to wage counter-publicity (Fisse and Braithwaite, n. 278 at p. 65) but to 'hunker down.' Shares fluctuated to a limited extent. Publicity prompted civil claims. (Fisse and Braithwaite, n. 278 at p. 70). Publicity generated concern amongst staff (see Fisse and Braithwaite, n. 278 at p. 71). *Kepone* upgraded environmental affairs manager to Vice President and they introduced a risk assessment committee.

In a study by Fisse and Braithwaite there was evidence that many companies introduced reforms following publicity.<sup>342</sup> All companies introduced some reforms which reduced the likelihood of recidivism.<sup>343</sup> Some disciplined employees but not many.<sup>344</sup> One of the conclusions of that study was that 'short term narrow-focus scandals can produce long-term broad reforms.'<sup>345</sup> Some reforms were designed to protect the company and individuals rather than the public.<sup>346</sup> Moreover, small companies, it was found, were likely to be more susceptible to publicity but also capable of closing down and reforming.<sup>347</sup> Fisse and Braithwaite's study revealed several other interesting points. First, they noted the myth of aggressive corporate fightback<sup>348</sup> and, whilst there was the potential for exploitation by competitors there was limited evidence of this happening. Indeed there were very few lost sales. Publicity did encourage civil suites<sup>349</sup> and a diminution of earnings was evident in some cases but not in majority.<sup>350</sup> There is a circuitous nature of good publicity and good corporate behaviour. Just as prestige may attract good personnel so bad publicity may deter them from joining an organisation that needs an infusion of 'good' personnel. Importantly, they believe that 'good reputé is valued for more than its relevance to financial goals; it is valued for its own sake.'<sup>351</sup> Fisse and Braithwaite contend that a system of voluntary disclosure may reduce cost of enforcement and allow corporation opportunity to indicate what they propose to do about problem.<sup>352</sup> There may be a need to offer incentives for voluntary disclosure.<sup>353</sup> Those incentives may take the form of negative inducements; Fisse and Braithwaite offer a suggestion of issuing a league table of worst records.<sup>354</sup> Other suggestions by Fisse and Braithwaite are for independent

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<sup>342</sup> Fisse and Braithwaite n. 278 at p. 227

<sup>343</sup> Fisse and Braithwaite, n. 278 at p. 233

<sup>344</sup> Fisse and Braithwaite, n. 278 at p. 234

<sup>345</sup> Fisse and Braithwaite, n. 278 at p. 235

<sup>346</sup> Fisse and Braithwaite, n. 278 at p. 236

<sup>347</sup> Fisse and Braithwaite, n. 278 at p. 238

<sup>348</sup> Fisse and Braithwaite, n. 278 at p. 229

<sup>349</sup> Fisse and Braithwaite, n. 278 at p. 230

<sup>350</sup> Fisse and Braithwaite, n. 278 at p. 231

<sup>351</sup> Fisse and Braithwaite, n. 278 at p. 248

<sup>352</sup> Fisse and Braithwaite, n. 278 at p. 263

<sup>353</sup> Fisse and Braithwaite, n. 278 at p. 264

<sup>354</sup> Fisse and Braithwaite, n. 278 at p. 266



corporate crime and correction commissions,<sup>355</sup> and social audit programmes (compiling details of injury rates, effluent levels, environmental violations and product complaints).<sup>356</sup> There is also support for encouraging whistle-blowing on the part of employees.<sup>357</sup> More importantly, they argue for an expansion of the scope of mandatory corporate disclosure.<sup>358</sup> Because publicity is not an interventionist sanction,<sup>359</sup> publicity and other sanctions ought to be used conjointly to sanction corporate crime.<sup>360</sup>

Assessing the potential of publicity as a sanction may lead one to conclude that 'the benefits of an activist participatory democracy, in which the powerful are forever facing challenges over alleged abuse of power, as outweighing the costs of being unfairly maligned from time to time.'<sup>361</sup> For all the undoubted problems, there is every reason for supposing that publicity as a formal sanction may, in the proper form and circumstances, prove a useful addition to any system of corporate criminal liability.

#### 4.10 Corporate Probation

According to Braithwaite, 'rehabilitation is a more workable goal for corporate criminal law than for individual criminal law because organisation charts and Standard Operating Procedures (SOPs) can more easily be rearranged than human personalities.'<sup>362</sup> Accepting that corporate criminal liability rather than individual liability is more efficient as a mechanism of crime control,<sup>363</sup> one might countenance that individual liability may be delegated from the court to the corporation. One such way this may be done is through corporate probation.<sup>364</sup>

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<sup>355</sup> Fisse and Braithwaite, n. 278 at p. 271

<sup>356</sup> Fisse and Braithwaite, n. 278 at p. 274

<sup>357</sup> Fisse and Braithwaite, n. 278 at p. 277

<sup>358</sup> Fisse and Braithwaite, n. 278 at p. 280

<sup>359</sup> Fisse and Braithwaite, n. 278 at p. 302

<sup>360</sup> Fisse and Braithwaite, n. 278 at p. 300

<sup>361</sup> Fisse and Braithwaite, n. 278 at p. 248

<sup>362</sup> Braithwaite, n. 7 at p. 291; Parker, n. 2 at p. 567

<sup>363</sup> Parker, n. 2 at p. 567

<sup>364</sup> *US v Murray* 275 US 347 at 357-8 91928. Chief Justice Taft said 'probation is the attempted saving of man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of imposition of sentence.' Probation was first considered in *US v Atlantic Richfield Company (ARCO)* 465 F 2d 58 (7th Cir, 1972) where company pled *nolo*

Inevitably probation and other similar approaches to sentencing entail the court becoming a corporate watchdog.<sup>365</sup> Oversight could be taken on the court's behalf by an experienced independent corporate lawyer, auditors, or a professional director.<sup>366</sup> Whatever the logistical problems, Gruner feels able to assert that 'despite some difficult problems of judicial administration, probation conditions requiring internal corporate changes will often be the most desirable sanction available to a sentencing court.'<sup>367</sup> Fisse describes probation as 'a sanction capable of pressing upon the nerve of corporate governance and thereby achieving more effective deterrence and rehabilitation.'<sup>368</sup>

The goals of corporate probation can be stated as rehabilitation-(evasion of harsh punishments which might impede rehabilitation-regulation of conduct is likely to promote rehabilitation),<sup>369</sup> punishment-(viewed as less harsh sentence but punitive nonetheless) and deterrence (it will be a condition of probation that there are no further offences).<sup>370</sup> Probation's advantages are that the court can insist on remedial action in response to the commission of the offence. That remedial action may take the form of revision of operating procedures or, it may mean changes to physical resources; probation emphasises that the conduct is unwanted. Probation can also be used to target managers and others. Another advantage of corporate probation is that as a sanction it is flexible enough not to damage corporations in financially straitened circumstances.<sup>371</sup> Further advantages include the following (1) it shifts the economic burden of probation to company (2) it may result in detection of more corporate violations because of greater access (3) there is congruence with the nature and operations of the business (4) because constraints

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*contendere* in an oil spillage case. The maximum punishment was small -\$2500 and the court wished to impose something more reflective of the damage. The sentence was that the court gave the company 60 days in which to formulate and implement a programme for dealing with the spillage. The fine was suspended. The company were successful on appeal but the concept of probation under a Federal Statute was upheld. (see Gruner, n. 145 at pp. 14-15).

<sup>365</sup> Stoner, n. 112 at p. 1288

<sup>366</sup> In US outside experts can be called in under the 1984 Act.

<sup>367</sup> Gruner, n. 145 at p. 48

<sup>368</sup> Fisse in Fisse and French (Eds.), n. 4 at p. 147

<sup>369</sup> Gruner, n. 145 at p.16

<sup>370</sup> Gruner, n. 145 at p 18

<sup>371</sup> Fisse 'Recent Developments In Corporate Criminal Law And Corporate Liability To Monetary Penalties' 1990 13 University of New South Wales L J 1-41 at pp. 9-11

/innovations come from senior management they are likely to be accepted by employees more readily (5) reforms may be more innovative (6) internal monitoring and discipline will be encouraged because of stakeholding. One drawback is the corporation's opportunity to formulate proposals to ensure technical compliance but evade the spirit of legal requirement.<sup>372</sup> There is also the fundamental problem identified by Parker who criticises the difficulty in scaling non-monetary penalties while contending that business organisations are unresponsive to any other form of penalty.<sup>373</sup>

Probation provides a,

'means for sentencing courts to rehabilitate a corporate defendant by forcing immediate changes in the defendant's decision making processes, internal monitoring activities, and personnel incentive practices. Second, probation conditions that bar a defendant from particular business practices likely to lead to further criminal behaviour can achieve specific deterrence similar to that which partial or complete imprisonment accomplishes for individuals. Third, given that top corporate executives have deep seated fears about their loss of control over aspects of corporate management, the threat of possible probation sanctions which require or limit business practices (along with associated reporting and monitoring requirements) might serve as a very effective general deterrent to illegal behaviour by large firms. Finally, corporate probation terms requiring social service by managers and employees of convicted firms can be punitive. The extraordinary efforts and expense involved in such service is a symbolic way for firms to compensate society for their crimes and serves as a constant reminder of the seriousness of those crimes.'<sup>374</sup>

It can be used to fill gaps in sentencing strategy<sup>375</sup> and if utilised properly can prove more efficacious than fines. Orders can be utilised to induce modifications in corporate activities and operations; fines offer no corresponding benefit. The possibility of transferring the penalty will undoubtedly be more difficult.<sup>376</sup> Corporate probation can be utilised as a substitute for economic sanctions or in addition to them. The conditions that the probation imposes need not be limited to

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<sup>372</sup> Gruner, n. 145 at p. 85

<sup>373</sup> Parker, n. 2 at p. 571

<sup>374</sup> Gruner, n. 145 at p.73

<sup>375</sup> Gruner, n. 145 at p. 4

<sup>376</sup> Gruner, n. 145 at p. 6

rehabilitative ends but may be utilised for specific deterrence and general deterrence or purely punitively.<sup>377</sup> The flexibility of the sanction means that it can be matched to particular defendants. Probation also offers an opportunity for monitoring and visits.<sup>378</sup> According to Gruner,

‘corporate probation is a flexible vehicle for imposing a wide range of sanctions having the common feature of continued judicial control over aspects of corporate conduct. Through the proper tailoring of these conduct restrictions, corporate probation can be used to punish, deter, incapacitate, or rehabilitate corporate offenders.’<sup>379</sup>

Hesitation about imposing corporate probation ‘may stem from a number of concerns, including doubts on the parts of sentencing courts about their ability to fashion probation conditions requiring meaningful changes in corporate practices or expectation that, since probation terms need to be voluntarily accepted....a firm faced with a burdensome set of probation terms would simply reject probation and agree to a maximum alternative fine.’<sup>380</sup>

Coffee, Gruner and Stone drafted proposals for the US Sentencing Commission which authorised corporate probation for serious offences for the following purposes-

*(1) To improve management policies or practices including inadequate internal controls, found by sentencing courts to have substantially contributed to illegal behaviour or delayed its detection*

*(2) To require factual reports on a defendant corporations criminal, behaviour (prepared by outside counsel or such other parties as the sentencing court shall appoint) where a sentencing court finds that the circumstances surrounding the defendant’s offense have not been adequately clarified to insure accountability of corporate personnel to shareholders*

*(3) To force convicted organizations to provide restitution to victims in all circumstances where promulgation of a restitution order is reasonable in the light of both the needs of victims for restitution and the likely complication or prolongation of the sentencing process if restitution is ordered*

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<sup>377</sup> Gruner, n. 145 at p. 7

<sup>378</sup> Gruner, n. 145 at p. 49-50

<sup>379</sup> Gruner, n. 145 at p. 3

<sup>380</sup> Gruner, n. 145 at p. 71; Bergman n. 70 at p. 1313 support the idea of corporate probation where by a judge can insist n changes in respect of safety matters. Fisse n. 371 at p. 33ff discusses the Toshiba deed whereby proceedings were not pursued in return of the corporation reaching a negotiated agreement to undertook compliance obligations.

- (4) *To obligate organizational defendants to provide essential community service or interim relief for the benefit of the victims of crime where an order for restitution is either infeasible or an adequate substitute; and*
- (5) *To require an organization already sentenced to pay a fine, make restitution, comply with an order for notice to its victims or perform community service to take steps necessary to ensure its deferred performance where these obligations will not be fully performed within 30 days of sentencing.*<sup>381</sup>

In these proposals one can see the interventionist scope of the sanction of probation and, its relationship with other sanctions. Self-regulation and community service (discussed *infra*) may be enforced through probation.<sup>382</sup> The costs of imposing probation are justifiably borne by the courts but internal changes effected to a corporation are borne by the company.<sup>383</sup> Corporate personnel could be designated to ensure compliance. What things might be changed ?-organization design; personnel practices; greater employee guidance on lawful behaviour; increased information handling and monitoring capabilities; improving lower level lawful behaviour; changes in corporate planning; and ultimately, personnel. There must be monitoring of probation.<sup>384</sup> As a sanction it has much to commend it not least because it may be a convenient base for other sanctions.<sup>385</sup> The successful operation of corporate probation in America, and its underlying objectives, offer every reason for supposing it might be a useful addition to our own system.

#### 4.11 Community Service

Fisse argues that there is a need to develop alternatives to the fine and that 'given the skills and resources generated by corporate power, the idea of community service has an intuitive appeal.'<sup>386</sup> Despite this appeal it has been suggested that 'To be workable, any sentence devised along these lines would need to avoid anthropomorphic preoccupation with the principles and practice of community

<sup>381</sup> Coffee, Gruner and Stone 'Standards For Organizational Probation' 8D2.1 quoted in Gruner, n. 145 at p. 9

<sup>382</sup> Gruner, n. 145 at p. 82

<sup>383</sup> Gruner, n. 145 at p. 80

<sup>384</sup> Gruner, n. 145 at p. 77

<sup>385</sup> Fisse in Fisse and French (Eds.), n. 4 at p. 144

<sup>386</sup> Fisse, 'Community Service As A Sanction Against Corporations' 1981 Wisconsin L. R. 920-1017 at p. 970



service orders as applied to human offenders.<sup>387</sup> According to Cohen, community service is not in widespread use in any of the Anglo-American jurisdictions<sup>388</sup> though there are examples in America of community service being imposed on corporate offenders as a condition of probation, as a condition of mitigation, and as a condition of non-prosecution.<sup>389</sup> Fisse cites the conflict of concepts of rehabilitation and supervisory prevention versus deterrence and retribution operative in Community Service Orders (CSOs). In respect of community service as mitigation, Fisse asserts 'Desirable as it is to develop additional sentencing options in corporate criminal law, to impose community service as a condition of mitigation of sentence is to introduce a new type of sanction without adequate direction.' Community service would be tax deductible unlike the traditional penalty of the fine. Moreover 'if community service is cast so wide that any kind of project will suffice in mitigation, corporate resources can be allocated by judges more or less at whim.'<sup>390</sup> The discretion which such an approach will confer on judges is self evident. Fisse suggests that one way of restricting the community service would be to link it to a project which prevents repetition of the occurrence.<sup>391</sup> It is important that the corporation performs the community service rather than simply sponsors a particular project. As Fisse argues 'where a corporation performs a program of community service, the effect is to internalize the punishment within an organization; much more is involved than simply writing a check.'<sup>392</sup>

As a sanction applicable to corporations, both America and Australia have considered community service. In USA it has been considered as part of the proposals for the revised Federal Criminal Code as part of the probation provisions; In Australia it has been considered by the Criminal Law Reform Committee as an

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<sup>387</sup> Australian Criminal Law and Penal Methods Reform Commission, 4th Report, The Substantive Criminal Law 354-369 South Australia (1978) at p. 364

<sup>388</sup> Cohen, n. 195 at p. 614

<sup>389</sup> Fisse, n. 386 at p. 971

<sup>390</sup> Fisse, n. 386 at p. 975

<sup>391</sup> Fisse, n. 386 at p. 976

<sup>392</sup> Fisse, n. 386 at p. 977

additional sanction. The basic paradigm of community service suggested by Fisse stipulates that,

‘Where a corporation is convicted of an offence the court may make a punitive order (here referred to as a ‘community service order’) sentencing the offender to undertake a project of community service in accordance with the subsequent provisions of this section.’<sup>393</sup>

Fisse’s scheme is modelled on the UK scheme for individual offenders. Community service is to be available for all offences except those offences where the punishment is prescribed. Fisse argues for this expansive application on the basis that ‘community service orders are capable of being used as a substitute as well as direct punitive redress. Since the range of substitute redress is infinite, no offense is beyond potential redress by means of community service.’<sup>394</sup> Fisse argues that it is important that community service be seen as a punishment and accordingly not tax-deductible or, subject to intellectual property rights for any product of such service. Fisse opposes a voluntary arrangement giving the corporation the option of community service on the basis that this would allow corporations simply to take the alternative of a fine.<sup>395</sup>

The second element to Fisse’s model of community service relates to its quantitative and temporal limits. His model states

*‘(a) The amount of community service required to be performed shall be quantified in terms of the actual net cost of materials, equipment and labor to be used for the project.*

*(b) Unless provided otherwise the maximum cost of community service under a community service order shall be the same as the maximum amount of the fine or monetary penalty applicable to the offense for which the order is made*

*(c) A project of community service shall be performed within two years of the date of sentence unless the court orders otherwise’*

In the UK the existing scheme for individual offenders details hours of service which is clearly inappropriate in respect of the corporate offender. In respect of the duration, Fisse says ‘Delaying the application of a sanction is likely to detract from

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<sup>393</sup> Fisse, n. 386 at p. 979

<sup>394</sup> Fisse, n. 386 at p. 979

<sup>395</sup> Fisse, n. 386 at p. 981

the force of its deterrent, instructive, retributive or other impact. Moreover, specifying a time limit is one means of discouraging stalling tactics.<sup>396</sup> The issue of corporate insolvency also seems pertinent in this context. The demise of the corporation may be one method deliberate or otherwise of evading the sanction.

The third element of Fisse's model outlines the particular projects acceptable as community service

- (a) A project of community service shall be either a project proposed by the offender and agreed to by the court or a project specified by the court*
- (b) A project of community service shall have as its object the redress of the social harm occasioned by the offense subject to sentence, and the redress sought shall take one or more of the following forms*
  - (i) direct redress by restoration, specific or approximate, of what has been harmed by the offense;*
  - (ii) substitutionary redress by development or introduction of measures designed to provide better means of preventing or redressing harm of the type proscribed by the offense; or*
  - (iii) substitutionary redress by participation in a program of social action authorized by regulation*
- (c) A project of community service shall be performed by personnel employed by the offender except where the court is satisfied that the assistance of an independent contractor is necessary to make the best use of the offender's own skills and resources*
- (d) The personnel by whom a project of community service is to be performed shall include representatives from managerial, executive and subordinate ranks of an offender's organization whether or not persons in all these ranks were implicated in the offense subject to sentence*
- (e) An offender subject to a community service order shall specify what persons are to undertake the required project of community service and, in the case of employees, shall indicate their rank within the organization.*<sup>397</sup>

The fourth element of Fisse's model concerns pre-service and compliance reports.

- '(a) An offender subject to a community service order shall be required by the court to submit within a specified time one or more reports setting out the measures which the offender has taken or proposes to take in order to comply with the order and, for the purposes of*

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<sup>396</sup> Fisse, n. 386 at p. 982

<sup>397</sup> Fisse, n. 386 at p. 983. See *US v Allied Chemical Corporation Company*- \$8m dollar charitable donation 420 F Supp 122 [1976], *US v Olin Mathieson*- donation to chair in ethics 2 June 1978 *New York Times*.

*compliance [under section 5], a report shall be submitted setting out the grounds and factual basis upon which the discharge is sought.*

*(b) An adviser shall be appointed by the court to report upon the feasibility, costing, progress and discharge of a project of community service unless the court is satisfied that, by reason of the trustworthiness of the defendant and the adequacy of its proposed reporting procedures, it is unnecessary to seek information from an additional source.*

*(c) For the purposes of this subsection an adviser shall be a person qualified to practice as a lawyer, accountant or business consultant, a probation officer or any other person agreed upon by the prosecution, the defendant and the court.*

*(d) The fees of an adviser appointed under this subsection shall be payable by the defendant as party costs unless the court orders otherwise*

*(e) An adviser appointed under this subsection shall have the powers of a special master.<sup>398</sup>*

The final element of Fisse's model concerns compliance. It states,

*'(a) A community service order shall be discharged upon proof by the offender of satisfactory compliance.*

*(b) A conviction resulting in a community service order shall be recorded as no conviction upon proof by the offender of compliance which is exemplary by reason of a quality or quantity of performance substantially in excess of that required for the purposes of satisfactory discharge*

*(c) A recording of no conviction under this subsection shall not affect any pleas of issue estoppel, res judicata or double jeopardy otherwise available*

*(d) If the offender fails to comply with any requirement imposed by or in connection with a community service order the court may*

*(i) continue the sentence of community service and require additional pre-service or compliance reports; or*

*(ii) revoke the sentence of community service and, subject to crediting any allowable costs incurred in performing service under that sentence, impose a fine in the same amount as to the costs specified in the community service order or, in the case of a suspended fine, in an amount that might originally have been imposed*

*(e) Proceedings for contempt may be taken against any person in breach of a community service order, or an order ancillary thereto.'*

Fisse himself suggests numerous worthwhile endeavours which may form part of a community service programme. He lists *inter alia* programs for unemployed persons, research into relieving tedium on production lines, participation in urban

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<sup>398</sup> Fisse, n. 386 at p. 986

renewal, development of safer conditions of industrial work, improvement of methods of cleaning up after spills of noxious or toxic substances, monitoring of advertisements or other retail practices in aid of consumer protection, review of environmental or clinical impact statements issued by public agencies or private enterprise, investigation into the effects of enforcement of debt legislation, and involvement in the design of product safety standards.<sup>399</sup> According to Fisse, 'community service orders would provide a stronger catalyst to internal discipline.'<sup>400</sup> He also claims that community service orders would be better than fines in achieving what he calls the five goals of corporate criminal liability-deterrence, direction, instruction, retribution and redress.<sup>401</sup> Moreover, in Fisse's view community service more directly hits the various targets of corporate criminal liability whereas fines only hit the surface entity.<sup>402</sup> The third major advantage proffered in the context of community service orders is the 'promotion of good by stimulation of constructive corporate reactions.'<sup>403</sup> In this sense the corporation could utilise its benevolent force coupling it with ingenuity and innovation.

Irrespective of attributes of community service orders there are, as Fisse accepts, a number of disadvantages. Significantly there are what might be termed logistical and practical difficulties. Fisse contends that 'The critical issue is whether punishing corporations by means of community service orders is open to fundamental attack on grounds of inefficacy, inefficiency, injustice or uncertainty.'<sup>404</sup> Fisse himself admits that some of these issues are impossible to predict and that 'the efficacy of community service orders may be challenged on grounds of leniency, counter-productivity and susceptibility to corporate intransigence and subterfuge.'<sup>405</sup> Corporation may use CSOs to enhance their image but there may be nothing intrinsically wrong with that.<sup>406</sup> Community service orders clearly have resource implications which may impact on regulation

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<sup>399</sup> Fisse, n. 386 at p. 1003

<sup>400</sup> Fisse, n. 386 at p. 1004

<sup>401</sup> Fisse, n. 386 at pp. 1004-5

<sup>402</sup> Fisse, n. 386 at p. 1006

<sup>403</sup> Fisse, n. 386 at p. 1006

<sup>404</sup> Fisse, n. 386 at p. 1008

<sup>405</sup> Fisse, n. 386 at p. 1008

<sup>406</sup> Fisse, n. 386 at p. 1009



and enforcement elsewhere. One way round this might be to have CSOs ordinarily running concurrent with probation orders. A further issue is the preparation of reports under the scheme - would corporations properly comply? Fisse concludes,

‘from a corporate, as opposed to anthropomorphic perspective, community service orders would provide a versatile sanction against corporations, a sanction superior in many ways to fines. Undoubtedly, there is fear of uncertainty, and ethical reluctance to experiment, but these factors seem of secondary concern. The main explanation appears to be that corporate crime is misconceived as morally neutral or insignificant, so that little point is seen in developing sanctions which have a stronger impact than fines. However, as long as fines remain the sanction used almost invariably against corporations, that misconception is likely to be reinforced, for fines tend to reduce even the most serious corporate offenses to a matter of price. Were community service orders available, serious offenses might well be exposed for what they are because by indicating the need for offenders to provide countervailing good, community service would help to show up what is bad and unwanted about the particular corporate offense subject to punishment. At the same time, any risk of crucifying corporations could be minimized by making satisfactory compliance a basis of resurrection, and exemplary compliance a means of ascension.’<sup>407</sup>

Community service may be useful where it necessitates unpleasant or embarrassing service on the part of company personnel; such an approach internalises the punishment and prevents passing on the penalty. It will be particularly efficacious if it involves top management. Not only is the argument for CSO convincing, the model offered by Fisse, based on CSO orders operating for individual offenders in this country, appears readily transplantable into our own jurisprudence.

#### **4.12 Self Regulation**

One of the key questions in the policing of corporate crime is whether regulation of corporations should properly be undertaken by external agencies (prosecuting authorities included) or, might it be more effectively done by participants in the business itself.<sup>408</sup> Put simply, rather than punishing offenders vigorously one might introduce incentives for corporations to regulate themselves.<sup>409</sup> Stone

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<sup>407</sup> Fisse, n. 386 at p. 1017

<sup>408</sup> Kraakman, n. 63 at p. 857

<sup>409</sup> Clinard, n. 243 at p. 222

suggests there is a need for 'a way of modifying corporate conduct that contrasts with, and is defined against a backdrop of, the generally prevailing techniques employed for modifying corporate behaviour.'<sup>410</sup> Coffee similarly claims that there is 'an incoherent conflict between 'moralistic' legal responses, which seek to maximise the public reprobation and symbolic denunciation of the conduct in question, and 'pragmatic' legal responses, which focus instead on prevention and therefore seek to optimize whatever conditions within the system most inhibit the disapproved conduct.'<sup>411</sup> There are several writers only too willing to extol the virtues of corporate self-regulation and endorse the view that 'The inculcation of ethical principles forms the very basis of all crime prevention and control.'<sup>412</sup> Fisse suggests that self regulation may appeal to the corporation's rational self interest.<sup>413</sup> Fisse's alternative view is that its modern relevance is 'simply expediency and efficiency.'<sup>414</sup>

Generally, there is greater interest in corporate compliance mechanisms primarily because of the perceived failure of traditional enforcement.<sup>415</sup> For all that, Clinard suggests that so far self-regulation has only been modestly successful.<sup>416</sup> Whilst there is considerable support for the concept, there are those who are sceptical. Baysinger for example argues that,

'Simply transferring the responsibility for controlling criminal behaviour to the private sector may not provide the solution. Common experience suggests that the forces resisting change in organizations are typically much stronger than the forces promoting change.'<sup>417</sup>

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<sup>410</sup> Fisse and French (Eds.), n. 4 at p. 14

<sup>411</sup> Coffee, 'Beyond The Shut - Eyed Sentry: Toward A Theoretical View Of Corporate Misconduct And An Effective Legal Response' 1977 63 Virginia L. R. 1099 at p. 1101

<sup>412</sup> James Inman quoted in Clinard, n. 16 at p. 161

<sup>413</sup> Fisse in Fisse and French (Eds.), n. 4 at p. 144.

<sup>414</sup> Fisse, n. 66 at p. 384; The Law Reform Commission of Canada adopted a similar viewpoint in saying, 'In a society moving increasingly towards group action it may become impractical, in terms of the allocation of resources, to deal with systems through their components. In many cases it would appear more sensible to transfer to the corporation the responsibility of policing itself, forcing it to take steps to ensure that the harm does not materialize through the conduct of people within an organisation. Rather than having the state monitor the activities of each person within the organization, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation to do this, especially if sanctions imposed on the corporation can be transferred into effective action at the individual level.'

<sup>415</sup> Smith, n. 68 at p. 12

<sup>416</sup> Clinard, n. 16 at p. 161

<sup>417</sup> Baysinger, n. 120 at p. 375

There are four principal arguments in favour of self regulation. The corporation can bring greater expertise and technical know-how to detection and enforcement; secondly, the costs of detection and enforcement are lower; thirdly, these costs are internalised; and fourthly, self regulation is less formalised in nature to other forms of external regulation.<sup>418</sup> Other tangible advantages of internal policing are that 'Private justice systems have a superior capacity to finger the culpable.'<sup>419</sup> Naturally, any strategy to compel the corporation to identify the individual wrongdoer is important.<sup>420</sup> Though corporate organisational reform may prove far better than traditional legal means of dealing with corporate wrongdoers,<sup>421</sup> there are those who believe that criminal punishment must be retained to underpin self-regulation.<sup>422</sup> According to Coffee, there is efficacy in providing positive and negative incentives to corporations.<sup>423</sup> All of this strikes a resonant cord but the real issue is how sentencing can encourage internal control?<sup>424</sup> Self-policing requires to inspire confidence. To have any credence self-regulation requires accountability.<sup>425</sup> Only as a voluntarist code detached from the system of criminal sanction or, as part of another sanction (perhaps probation or community service) can it have any legitimacy. In respect of the latter perhaps enforced self-regulation may be the preferred approach. A system of enforced self-regulation permits corporations to prepare and lodge compliance plans with regulatory bodies for approval. Thereafter, it will be necessary for larger companies to establish their own inspectorial group. State agencies would continue to audit the effectiveness of

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<sup>418</sup> See Ogus, *Legal Form And Economic Theory* (1994) at p 107

<sup>419</sup> Fisse and Braithwaite in Findlay and Hogg (Eds.), *'Understanding Crime And Criminal Justice'* (1988) at p. 106.

<sup>420</sup> Fisse and Braithwaite in Findlay and Hogg (Eds.), n. 419 at p. 107.

<sup>421</sup> Clinard, n. 243 at p. 216

<sup>422</sup> Braithwaite, n. 7 at p. 319

<sup>423</sup> Coffee, n. 411 at p. 1117. Howarth describes the self monitoring regime of effluent discharges; it reveals a balance between self monitoring supported with investigatory powers and backed up with criminal sanctions. The companies keep pollution control registers which the public have access to (see Howarth, *'Self-Monitoring, Self-Policing, Self-Incrimination And Pollution Law'* 1997 60 2 Modern L. R. 200-229 at pp. 210-212; *Wales v Thames Water Authority* (1988) 1 Environmental Law No 3.

<sup>424</sup> C. Clarkson, *'Kicking Corporate Bodies And Damning Their Souls'* 1996 59 Modern L. R. 557

<sup>425</sup> Page, *'Self Regulation; The Constitutional Dimension'* 1986 49 2 MLR 141-167 at p. 164

the internal compliance group and, to punish any violation of the law.<sup>426</sup> Such a system attempts to balance private justice with public ratification.<sup>427</sup> Violation of such privately written and publicly ratified rules would continue to be punished by the State.<sup>428</sup> However, it is imagined that the sense of ownership which the corporation would derive from having written its own code of conduct would inculcate a greater sense of social responsibility.<sup>429</sup> There is however a down side; there would be considerable resource implications for State authorities in approving company schemes but more importantly, there is the fear that privately written standards could allow the corporation to frame the law in such a way as to allow to evade the spirit of the law.<sup>430</sup> Braithwaite's model was devised as a free standing scheme and as such it fails. The conception and theory is solid enough but its practical implementation has not proven to be a major success. There were attempts in the mid-1980s to introduce such ideas into health and safety matters. They were unsuccessful because spectacular failings led to the approach falling into disrepute. The public simply do not like the idea of the regulated devising the standards by which they will be regulated. Public faith in the system is central to criminal liability code and the public are not yet convinced that the corporation can play 'poacher and gamekeeper.' There is nonetheless merit in directing scarce regulatory resources away from corporations which self regulate towards those that 'play fast and loose.'<sup>431</sup> It is more likely that this will be brought about by regulatory discretion rather than any other means.

What form might that self-policing take ? Fisse notes the establishment of review committees.(e.g. Gulf Oil Corporation) as one possible solution.<sup>432</sup> Companies must maintain open policies to encourage employee whistle blowing and of course to provide exemplary leadership.<sup>433</sup> Some companies have created ombudsman

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<sup>426</sup> Braithwaite, 'Enforced Self-Regulation: A New Strategy For Corporate Crime Control' 1982 80 Michigan Law Review 1466 at p. 1471

<sup>427</sup> See Braithwaite, n. 426 at p. 1466

<sup>428</sup> Braithwaite, n. 426 at p. 1471

<sup>429</sup> Braithwaite, n. 426 at p. 1478-9

<sup>430</sup> Braithwaite, n. 426 at p. 1495ff

<sup>431</sup> Braithwaite, n. 426 at p. 1502

<sup>432</sup> Fisse, n. 66 at p. 385

<sup>433</sup> Westin, *Whistle Blowing: Loyalty And Dissent In The Corporation* (1981) at p. 142

systems.<sup>434</sup> Donaldson suggests that they should alter corporate boards to include employee and consumer directors, develop employee reward systems which motivate moral behaviour, and establish corporate constitutions which specify moral goals.<sup>435</sup> Identifying particular internal business practices that may help prevent further misconduct might also be a useful feature.<sup>436</sup> Clinard and Yeager call for more effective general corporate business codes<sup>437</sup> perhaps through industry associations<sup>438</sup> or through business schools.<sup>439</sup> They also support publicly appointed board members<sup>440</sup> and chartering controls.<sup>441</sup> Their support is premised on the fact that the sheer resource issue make the ability of government to investigate and litigate on equal terms difficult.<sup>442</sup> Another suggestion has been that of a second chamber as a means of monitoring board performance.<sup>443</sup> Yet another has been the appointment of corporate officers responsible for compliance with criminal law.<sup>444</sup> Braithwaite offers examples of executives with a criminal responsibility duty<sup>445</sup> which thereby create a structure to deflect liability away from the corporation. According to McVisk, what is needed is clear delineation of the expectations of all personnel within the company outlining their role in ensuring compliance with the law. He says 'in this way individual responsibility can be incorporated into every case where criminal liability is based upon corporate

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<sup>434</sup> See Westin, n. 433 at p. 144

<sup>435</sup> Donaldson, n. 19 at pp. 166-7

<sup>436</sup> Gruner, n. 145 at p. 49 op cit. Internal discipline orders suggested by Mitchell Committee in South Australia 'Essentially, internal discipline orders would require a corporation to investigate an offence committed on its behalf, undertake appropriate disciplinary proceedings, and return a detailed and satisfactory compliance report to the court issuing the particular order. In the event of unreasonable non-compliance corporate criminal responsibility would be necessary in some cases, but usually it would be sufficient to impose individual criminal responsibility on those personnel specified in the order as responsible for securing compliance. Unlike the system of Frankpledge, the object of internal discipline orders thus would be not be to produce guilty individuals to the prosecuting authorities, but to cast part of the burden of enforcement squarely upon the enterprise on whose behalf an offence has been committed' (South Australia Criminal law and Penal Methods Reform Committee Fourth Report The Substantive Criminal Law (1977) at pp. 361-62).

<sup>437</sup> Clinard and Yeager, n. 18 at p. 303

<sup>438</sup> Clinard and Yeager, n. 18 at p. 304

<sup>439</sup> Clinard and Yeager, n. 18 at p. 304

<sup>440</sup> Clinard and Yeager, n. 18 at p. 309

<sup>441</sup> Clinard and Yeager, n. 18 at p. 311

<sup>442</sup> Clinard and Yeager, n. 18 at p. 313

<sup>443</sup> See Rostow in Mason (Ed.), *The Corporation In Modern Society* (1961) at p. 8.

<sup>444</sup> W. McVisk, 'Toward A Rational Theory Of Criminal Liability For The Corporate Executive' 1978 69 *Journal of Criminal Law and Criminology* 75 at p. 89.

<sup>445</sup> See Braithwaite, n. 7 at p. 308.



acts.’<sup>446</sup> The expectation is that corporate management would identify these individuals. The advantage of the system according to McVisk is that the organisation can be utilised as a benevolent force in favour of the law and it would avoid abrogating ‘traditional requirement of the criminal law.’<sup>447</sup>

Specific prevention may ensue where the enforcement agencies insist of specific measures as a condition of non-prosecution; where it is a condition of probation or conditional discharge, where it is a condition of deferment or reduction in sentence, where it is required by mandatory injunction or preventory order, and finally, where offence prevention is promoted by specifying lines of individual accountability within a corporation.<sup>448</sup> Preventative practices suggested by Clinard,<sup>449</sup> include strong controls over corporate ethics on the part of top management;<sup>450</sup> frequent guidelines on regulations from top management; quarterly staff meetings for middle management; open door policy for middle managers; middle-management discussions with legal officers; frequent visits to subsidiaries and plants; specific training in ethics and regulation; signature of statement (yearly) to confirm familiarity with regulations; signature confirming that middle managers know they will face the sack if they violate; and penalties such as dismissal for violations. The supposition is that internal corporate discipline has a higher probability of application.<sup>451</sup>

Notwithstanding these positive attributes, there are problems with self-regulation as a control mechanism. As we have already noted, disciplinary programmes may be too disruptive, too embarrassing or too dangerous a stimulant to whistle blowing or too fertile a source of civil litigation.<sup>452</sup> Moreover, suspicion surrounds any State sponsorship of self-regulation as an alternative to direct regulation because of the conflict between the State’s role as custodian of the public interest and the

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<sup>446</sup> McVisk, n. 444 at p. 90.

<sup>447</sup> McVisk, n. 444 at p. 91.

<sup>448</sup> Fisse, n. 66 at p. 387

<sup>449</sup> Clinard, n. 68 at p. 159

<sup>450</sup> See Cressey and Moore quoted in Clinard and Yeager, n. 18 at p. 302

<sup>451</sup> Coffee, n. 68 at p. 410

<sup>452</sup> Fisse and Braithwaite in Findlay and Hogg (Eds.), n. 419 at p. 101.

perceived denial of responsibility.<sup>453</sup> Clinard expresses some doubt about corporation's capacity to self-regulate claiming that while profits remain bottom line self-regulation will remain nothing more than a platitude. Unless enforcement is contained within ethical codes they are nothing more than public relations gimmicks;<sup>454</sup> industry wide codes are a useful development.<sup>455</sup> Coffee offers another cautionary note suggesting that 'reliance on private enforcement may require us to abandon the advantages of prosecutorial discretion.'<sup>456</sup> Although internal policing by corporations can be effective it has been suggested that 'evidence of internal discipline within large corporations is conspicuously absent at senior corporate levels.'<sup>457</sup> Though there is evidence of consciousness raising amongst some executives, success in reducing corporate crime has been elusive.<sup>458</sup> Risser's suggestion is to concentrate on corporations internal decision structure.<sup>459</sup> In his view structural flaws can lead to wrong and harm and by focusing in on these one can avert that harm. Adopting Goodpaster's model for organisational decision making (moral perception, moral reasoning, co-ordination and sensitivity to implementation),<sup>460</sup> he suggests that one can proactively assess each component with a view to identifying whether a corporation is both capable and likely to commit wrongdoing. For example, the absence of mechanisms to gather information is a key indicator that the corporation does not have the capacity 'to assess the potential impact that alternative course of action are likely to have on others.'<sup>461</sup> Flaws in training programmes will point to a failure in co-ordination.<sup>462</sup> The absence of a code of ethics might indicate an absence of proper reasoning. In Risser's model 'A corporation found to have an IDS which is flawed in a way which prevents it from performing well at one or more of the stages would be issued with a warning fully describing the flaw(s), indicating the likelihood of

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<sup>453</sup> Page, n. 425

<sup>454</sup> Clinard, n. 16 at p. 162

<sup>455</sup> Clinard, n. 16 at p. 163

<sup>456</sup> Coffee, n. 68 at p. 438

<sup>457</sup> Coffee, n. 68 at p. 409

<sup>458</sup> Yoder, n. 181 at p. 41 op cit.

<sup>459</sup> Risser, 'Punishing Corporations: A Proposal' 1989 8 Business and Professional Ethics Journal 83-92 at p. 85

<sup>460</sup> See Goodpaster, 'The Concept Of Corporate Responsibility' in *Just Business: New Introductory Essays in Business Ethics*, (Regan Ed., 1983) at pp. 292-322

<sup>461</sup> Risser, n. 459

<sup>462</sup> Risser, n. 459 at p. 86

misconduct, and suggesting possible structural reforms.<sup>463</sup> Failure to take action would lead to the corporation having difficulty in defending itself in any subsequent proceedings. Risser suggests that regulatory authorities would have responsibility for issuing warnings.<sup>464</sup> He also envisages a system whereby warnings would be published in the media and made available to the wider business community. Risser himself recognises an obvious flaw with his proposal; the sheer impracticability based on resourcing.<sup>465</sup> The warnings in themselves would not be punishments but could be integrated into an approach for punishing corporations. They may form part of a *post hoc* punishment on the corporation whereby the court look at the warning issued to the corporation, utilising it to impose an alternative sanction such as reforming the internal decision structure of the company perhaps, imposing new directors or the formal creation of special committees. Risser's approach is three staged- warnings, adverse publicity, and formal re-structuring.

Braithwaite suggests that when assessing whether a company is effectively self-regulating one should ignore the corporate code of ethics along with any social audit from the annual report. Instead one should ask the following questions- Is the Chief Executive officer actively involved in setting compliance and social responsibility goals for the corporation ? Do Standard Operating Procedures(SOPs) establish controls which make violation of the law difficult ? Are there compliance groups with organisational muscle ? Can the corporation demonstrate a history of effectively sanctioning employees who violate SOPs designed to prevent crime ? Does the corporation write down only good news ? Are unspoken understandings the basis on which sensitive decisions are made ? Does the corporate case law which can be abstracted embody scrupulous commitment to the letter and the spirit of the law ?<sup>466</sup> Braithwaite's suggestion is that the company writes down the approach taken to an ethical dilemma which it has previously confronted and in this way develops corporate case law. These can be spread to lower level

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<sup>463</sup> Risser, n. 459 at p. 87

<sup>464</sup> Risser, n. 459 at p. 87

<sup>465</sup> Risser, n. 459 at p. 88

<sup>466</sup> Braithwaite, n. 7 at p. 362

employees. Senior management can exercise a tight control on corporate case law.<sup>467</sup> In the opinion of Fisse and Braithwaite good internal policing will have five traits -(1) lots of clout given to compliance personnel (2) defined accountability of line managers (3) monitoring of performance and mechanisms for feed back to line managers (4) effective communication will be left to those knowledgeable and (5) no neglect of training and supervision.<sup>468</sup>

Whilst compliance strategies may be a good idea, one of the dangers of a company spelling out its perceived risks of legal liability is that it may encourage enforcement agencies to intervene.<sup>469</sup> A further drawback or impediment of self-regulation might be oppressive management.<sup>470</sup> Fisse suggests that internal compliance programmes should be built on the management of risk.<sup>471</sup> The standard elements should include -(1) clearly stated compliance policies reinforced by top and middle managers; (2) systematic identification and management of risks created by company operations; (3) clear allocation of responsibility for compliance functions; (4) Segregation and rostering of functions in high risk areas to restrict opportunities for non compliance; (5) readable compliance manuals setting out relevant standards, operating procedures and examples; (6) routine controls and monitoring and enforcement of compliance; (7) education and training of personnel; (8) interaction with enforcement agencies; (9) action plans in event of discovery of illegality; (10) investigative and reporting procedures.<sup>472</sup>

It seems a self-evident expression of common-sense that there should be attempts to have the corporation take regulatory or disciplinary steps rather than have criminal proceedings. However, as Fisse notes, one of the flaws with the notion

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<sup>467</sup> Braithwaite, n. 7 at p. 351

<sup>468</sup> Fisse and Braithwaite, *Corporations Crime And Accountability*, (1993) at p. 18

<sup>469</sup> Fisse, 'Corporate Compliance Programmes: The Trade practices Act' 1989 17 Australian Business Law Review 356 at p. 368

<sup>470</sup> Braithwaite, n. 7 at p. 359

<sup>471</sup> Fisse, n. 469 at p. 358; GEC after the electric cases instituted a compliance programme to ensure that managers and executives adhered to the law Management training was expanded to include legal and ethical conduct (see C. Walton and F. Cleveland, *Corporations On Trial: The Electric Trials*, (1964) at p. 101).

<sup>472</sup> Fisse, n. 469 at pp. 359-60; May also be backed with offence of negligent failure to ensure adequate compliance controls (see Fisse, n. 469 at p. 394)

that corporate liability will ensure an organisational response against individual wrongdoers is that 'the law now makes little or no attempt to ensure that such a reaction occurs.'<sup>473</sup> Fisse points out that there is little evidence of company disciplinary responses to the imposition of corporate criminal liability. He concludes that,

'It is readily apparent ..that companies have strong incentives not to undertake extensive disciplinary action. In particular a disciplinary program may be disruptive, embarrassing for those exercising managerial control, encouraging for whistle-blowers or hazardous in the event of civil litigation against the company or its officers. Sometimes these incentives may be veiled by the claim that the problem has been sufficiently investigated and resolved by public enforcement action.'<sup>474</sup>

One method of encouraging private policing is to make punishment on the corporation conditional partially on the failure to achieve internal accountability.<sup>475</sup> The failure to take disciplinary measures *post hoc* the violation would result in the corporation being sanctioned.(see para 4.13 below) An alternative is Coffee's proposal that internal corporate discipline be a condition of corporate probation. These approaches to individual accountability would address what has been described as a 'pandemic' problem of non-prosecution of corporate officials.<sup>476</sup> What is being proposed is private justice being monitored by public justice designed to ensure effective monitoring and to, protect against scapegoating. These private justice systems would be paid for by the corporations (a not unreasonable expectation).<sup>477</sup> Some of the sanctions available to private justice systems may be less potent than public justice systems; however dismissal and professional disbarment may be as significant a sanction as any. Can we rely on corporations to police themselves ? Fisse and Braithwaite expound considerable faith in commercial concerns which is not endorsed by the present writer.<sup>478</sup> It appears to be a leap of faith not supported by past reflection.

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<sup>473</sup> Fisse, n. 65 at p. 469.

<sup>474</sup> Fisse, n. 65 at p. 472.

<sup>475</sup> Fisse and Braithwaite in Findlay and Hogg (Eds.), n. 419 at p.111.

<sup>476</sup> Fisse and Braithwaite in Findlay and Hogg (Eds.), n. 419 at p.112.

<sup>477</sup> Fisse and Braithwaite in Findlay and Hogg (Eds.), n. 419

<sup>478</sup> Fisse and Braithwaite in Findlay and Hogg (Eds.), n. 419 at p.113.



An alternative approach proffered as a solution to corporate criminal liability is one based on the reasonableness of the corporation's practices and procedures to avert illegal conduct which would better reflect the blameworthiness of the corporations as an entity.<sup>479</sup> (essentially the defence of due diligence). The basics of such a system would be that the conduct had been 'clearly and convincingly forbidden' and 'that reasonable safeguards designed to prevent corporate crimes had been developed and implemented including regular procedures for evaluating, detection and remedy.'<sup>480</sup>

Several of these self regulation ideas could contribute much to an overall approach to corporate crime. They are not, of their own, panaceas for the control of corporate misconduct. The corporation as a social actor has not shown itself capable of self regulating. Nor is there any real justification for offering a differential penal system. Private justice must not be arraigned against public justice.<sup>481</sup> Any system of corporate criminal liability must however recognise the possible contribution of self regulation as offering a long term contribution to diminution of illegal activity. It would be naive in the extreme to envisage a strategy solely based on self regulation. One simply cannot place too much reliance on private justice systems,<sup>482</sup> but a system of criminal sanction which integrates with and activates the internal mechanisms of the corporation has much to commend it. Assessment of the internal conduct could undoubtedly contribute to the *post hoc* assessment of the sanction. Moreover any strategic sanctioning approach which encourages self compliance must be beneficial. Fisse and Braithwaite argue that, 'Instead of treating the corporation's inner pressures as a 'black box' to be influenced only indirectly through threats laid about the environment like traps, we need more straightforward 'intrusions' into the corporation's decision structure and processes than society has yet undertaken.'<sup>483</sup>

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<sup>479</sup> *Developments*, n. 114 at p. 1257.

<sup>480</sup> *Developments*, n. 114 at p. 1258.

<sup>481</sup> Fisse and Braithwaite, n. 468 at pp. 38-40

<sup>482</sup> Fisse and Braithwaite in Findlay and Hogg (Eds.), n. 419 at p 94

<sup>483</sup> See Fisse and Braithwaite, n. 278 at p. 300

#### 4.13 Reactive Corporate Fault/Reactive Self Regulation

A further proposal advanced as a basis and mode of punishment is that of reactive corporate fault defined as a 'corporation's fault in failing to undertake satisfactory preventive or corrective measures in response to the commission of the *actus reus* of an offence by personnel acting on behalf of the organisation.'<sup>484</sup> Reactive corporate fault may be defined as the 'unreasonable corporate failure to devise and undertake satisfactory preventive or corrective measures in response to the commission of the *actus reus* of an offense by personnel acting on behalf of the organizations.'<sup>485</sup> Fisse argues that 'The challenge ahead is not so much to improve the application of individual criminal liability as it is to harness the police power of corporations.'<sup>486</sup> By adopting the reactive fault model suggested by Fisse the company could be required to conduct an inquiry as to who was responsible for the wrongdoing; to take internal disciplinary action; and to report detailing the action taken. Fisse concedes that,

'The strategy here is to rely on the good faith of corporations while at the same time to make it plain that the lack of good faith will be severely punished. When the law imposes obligations on corporations, most will feel obliged to comply; the model of good corporate citizen is not merely an artefact displayed for public relations. If, on the other hand, the law treats corporations as unworthy of trust, then resentment is inevitable and non-compliance is likely to be a self-fulfilling prophecy.'<sup>487</sup>

It is believed that 'Corporations, through their standard operating procedures, may actually have a greater capacity of reactive adaptation than do human beings.'<sup>488</sup> As a concept it would display strategic *mens rea* on a *post hoc* basis.<sup>489</sup> Ashworth explains the idea of utilising company policies or their absence for the basis of liability on a reactive fault basis. He explains it in the following terms -

'rather than expending prosecutorial energy and court time trying to disentangle the often convoluted internal structures and policies of corporations, the law should require a company which has caused or

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<sup>484</sup> Fisse, n. 116 at p. 1197; *People v Albany and Vermont Railroad 12 Abb. Pr 171 (NY Sup Ct 1860)*; see also *US v Olin Corporation (Criminal NO 78-30 (June 1 1978))*

<sup>485</sup> Fisse and French (Eds.), n. 4 at p. 187

<sup>486</sup> Fisse, n. 65 at pp. 510-11.

<sup>487</sup> Fisse, n. 65 at p 513.

<sup>488</sup> French, *Corporate And Collective Responsibility*, (1979) at p. 162

<sup>489</sup> Fisse, n. 116 at p. 1198

threatened a proscribed harm to take its own disciplinary and rectificatory measures. A court would then assess the adequacy of the measures taken. The concept of faith would thus be a *post hoc* phenomenon. Rather than struggling to establish some antecedent fault within the corporation, the prosecution would invite the court to infer fault from the nature and effectiveness of the company's remedial measures after it had been established that it was the author of a harm-causing or harm-threatening act or omission. The court would not find fault if it was persuaded that the company had taken realistic measures to prevent recurrence, had ensured compensation for any victims, and had taken the event seriously in other respects.<sup>490</sup>

In implementing the scheme, there would be a need to define the concept, offences it would apply to and the specified reactive duties.<sup>491</sup> Fisse proposes the following scheme of reactive non-compliance

- '1. A serious offense of reactive non-compliance would require proof of strategic mens rea- an express or implied corporate policy of deliberate or reckless non-compliance with a legal duty to undertake preventive or corrective reactive measures*
- 2. A less serious offense of reactive non-compliance would require a failure to comply with a legally imposed duty, subject to an affirmative defense that the corporation exercised due diligence in attempting to comply.*<sup>492</sup>

This would be applicable to ordinary serious offences and one could create a general offense of reactive non-compliance.<sup>493</sup> Fisse's scheme proposes the following formulation

- '1 Occasion for reaction*
  - (a) commission of the actus reus of a criminal offence or civil violation by one or more agents acting on behalf of the corporation; and*
  - (b) receipt of notice of reactive obligation through a compliance order, containing one or more of the alternatives below, issued by a court or administrative agency and served upon corporation through one or more of its officers*
- 2. Type of reaction required- as specified by a compliance order issued pursuant to the above procedure and within the following authorized range*
  - (a) initiation and completion of an effective program of internal disciplinary action*

<sup>490</sup> A. Ashworth, *Principles Of Criminal Law*, (2nd Ed., 1995) at pp. 116-7

<sup>491</sup> Fisse, n. 116 at p. 1201

<sup>492</sup> Fisse, n. 116 at p. 1202; see also *Developments*, n 114 at p. 1257

<sup>493</sup> Fisse, n. 116 at p. 1204

(b) *modification of compliance policies or standard operating procedures which, if left in place, would be likely to occasion further violations;*

(c) *redress by means of compensation, restitution or rectification and*

(d) *facilitation of the redress of corporate harm-doing by providing public notice of likely rights of action, impact assessment studies, and other means of remedial assistance*

3 *Time frame for compliance- as specified by a compliance order issued pursuant to the above procedure, subject to guidelines or maximum limits prescribed for each of the reactive requirements authorized under (2)*

(4) *Persons subject to the obligation- as specified by a compliance order issued pursuant to the above procedure, but always including as primary obligors*

(a) *the corporation on whose behalf the threshold actus reus has been committed and*

(b) *members of a managerial task force charged with the responsibility of initiating and monitoring a program of reactive compliance.*<sup>494</sup>

An obvious concern is whether companies will resort to delaying tactics.<sup>495</sup> Due diligence will require to show that the illegal conduct has been convincingly forbidden and that safeguards have been designed to prevent corporate crimes has been developed.<sup>496</sup> In response, Fisse calls for a duty of reactive due diligence.<sup>497</sup> All of this poses the question 'why should 'corporations be given a free bite at the apple of crime'?'<sup>498</sup> The perceived benefit of the scheme is that

'Although few corporations operate under policies of non-compliance, all can be placed on notice that they are expected, as matter of specific reactive policy, to respond to an *actus reus* by formulating and implementing a satisfactory program of preventive or corrective reaction.'<sup>499</sup>

One can deduce merit in the contention that 'corporate responsibility should be also be assessed on the basis of a defendant's responses to prohibited harm-causing or risk taking.'<sup>500</sup> Where the proposal is unconvincing is that it conflicts with the notion of the egalitarian application of the criminal law to corporations and

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<sup>494</sup> Fisse, n. 116 at p. 1206

<sup>495</sup> Fisse, n. 116 at p. 1207

<sup>496</sup> Fisse, n. 116 at p. 1207; *Developments*, n. 114 at pp. 1257-8

<sup>497</sup> Fisse, n. 116 at p. 1208

<sup>498</sup> Fisse, n. 116 at p. 1209

<sup>499</sup> Fisse, n. 116 at p. 1213

<sup>500</sup> Fisse and French (Eds.), n. 4 at p. 187

individuals alike. Corporations can just as easily be placed on notice that if they violate the criminal law they will be prosecuted and punished appropriately. Obviously reactive corporate fault is a promising way of avoiding contentious attribution of criminal intentionality to a corporation<sup>501</sup> but that is almost a negative rationale for its existence rather than an inherently positive one.

Reactive corporate fault requires both non-interventionist and interventionist sanctions.<sup>502</sup> Stone's view is that 'the more intrusive the intervention, the more it should be reserved for a relatively narrow class of situations in which the warrant for doing so appears sufficiently strong.'<sup>503</sup> Fisse and Braithwaite suggest that a denunciatory report should only be used selectively in sentencing where there had been an inadequate corporate reaction.<sup>504</sup> Their recommendation is that court ordered sentence against corporate offenders should be publicised and that pre-sentence probation reports should be used to require disclosure of organisational reforms and disciplinary action as a result of the offence.<sup>505</sup> Sullivan criticises the reactive fault model suggested by Fisse and Braithwaite as one that would require 'much in the way of expert scrutiny and investigation.'<sup>506</sup> Fisse himself recognised that corporate fault could prove to be the 'blackest hole in theory of corporate criminal law.'<sup>507</sup> The 'glaring theoretical deficiency in managerial *mens rea* is that no necessary connection to corporate blameworthiness.'<sup>508</sup> Ashworth in something of an understatement says that 'The unusual features of 'reactive fault' may make

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<sup>501</sup> Fisse and French (Eds.), n. 4 at p. 188

<sup>502</sup> Braithwaite in Fisse and French (Eds.), n. 4 at p. 206

<sup>503</sup> Stone, n. 6 at Ch 2; Under American ABA proposal a sentence of continuing judicial supervision cannot be imposed unless the criminal behaviour was serious, repetitive and facilitated by inadequate internal accounting or monitoring controls or that a clear and present danger exist to the public health or safety (Fisse and French (Eds.), n. 4 at p. 190).

<sup>504</sup> Fisse and Braithwaite, n. 278 at p. 307

<sup>505</sup> Fisse and Braithwaite, n. 278 at p. 312. Section 405 of the Brown Commission's Study Draft (US National Commission on Reform of Federal Criminal law 1970)'when an organisation is convicted of an offence, the court may, in addition to or in lieu of imposing other authorised sanctions..require the organisation to give appropriate publicity to the conviction by notice to the class or classes of persons or sector of the public interested in or affected by the conviction, by advertising in designated areas or by designated media or otherwise' (quoted in Fisse, n. 289 at p. 147)

<sup>506</sup> Sullivan, 'Expressing Corporate Guilt' 1995 15 Oxford Journal Of Legal Studies 281-293 at p. 288

<sup>507</sup> Fisse, n. 116 at p. 1183 cf. *Developments* n. 114 at p. 1242

<sup>508</sup> Fisse, n. 116 at p. 1187



the concept slow to gain acceptance.<sup>509</sup> Despite this, the English Law Commission paper offers tentative support for the *post hoc* assessment of corporate conduct.<sup>510</sup> For the reasons advanced earlier, the universal application of the concept of reactive corporate fault is at the present time insupportable. The *post hoc* assessment of liability negates the intellectual rationale of equanimity and offers little in the way of strategic deterrence.

### Enforced Self-Reaction

Enforced self-reaction is an extension of Braithwaite's enforced self-regulation (discussed *supra*) and has similar features to reactive corporate fault. It requires a two stage hearing.<sup>511</sup> The first hearing establishes if *actus reus* has been committed by the corporate defendant thereafter the defendant would need to prepare a report indicating what compliance measures they had taken including future proposals and restitution proposals. The second hearing would decide whether the reaction had been sufficient. If there is a suitable response the corporate defendant would be acquitted and if not it would be convicted. As such intervention in the corporation would be contingent on the failure of company to make responsive adjustment as required.<sup>512</sup> Enforced self reaction would preserve managerial freedom as long as there was a suitable responsive adjustment<sup>513</sup> This contrasts with Braithwaite's original model which has greater State intervention in the actual response. It seeks to strike a balance requiring a response without being overly interventionist.<sup>514</sup> Intervention would be confined to requiring preparation of a report with subsequent assessment of that report. Naturally, there are problems in setting legal standards of corporate behaviour.<sup>515</sup> If one specifies standards in advance this gives a chance for corporations to find loopholes.<sup>516</sup> Moreover, there

<sup>509</sup> Ashworth, n. 490 at p. 117

<sup>510</sup> Law Commission Consultation Paper see para 5.57-5. 58

<sup>511</sup> Fisse and French (Eds.), n. 4 at p. 191

<sup>512</sup> Fisse and French (Eds.), n. 4 at p. 191

<sup>513</sup> Fisse and French (Eds.), n. 4 at p. 191

<sup>514</sup> Fisse and French (Eds.), n. 4 at p. 192

<sup>515</sup> 1 rules or general application are universalistic

2 rules must be clear and precise

3 rules cannot reach the high standards possible on a moral plane but are minimalistic

4 rules promote conformity and stability not dynamism (Fisse and French (Eds.), n. 4 at p. 193).

<sup>516</sup> Fisse and French (Eds.), n. 4 at p. 194

is a fear that by imposing standards will depress moral expectations in society.<sup>517</sup> Enforced self-reaction is a shame based system (for those who have been given a chance) geared to promotion of higher standards<sup>518</sup> which gives fair notice of prohibitions without imposing precise rules.<sup>519</sup> There are those who believe it will help develop exemplars for other industries<sup>520</sup> In addition it will be possible to pursue a policy of maximisation of individual accountability by sentencing for unsatisfactory reaction report.<sup>521</sup> One possible side benefit is that enforced self reaction would provide a framework for administrative development of prosecutorial guidelines and discretion.<sup>522</sup> Whilst it is an interesting proposition it suffers from the same deficiencies outlined in respect of reactive corporate fault. The criminal law and criminal sanction must retain some *in terrorem* impact. A post occurrence evaluation for corporate violations is only likely to fuel further the perception of double standards within our criminal law. Nevertheless, whilst rejecting such *post hoc* assessment as basis for sanction they may offer something more in respect of quantification of sanction. The willingness of the corporation to make modification or restitution may well be a factor in mitigation.

#### 4.14 Conclusion

Despite the inevitable complications in applying traditional sanctions to the corporate entity, it is apparent from a sweeping survey of the Anglo-American jurisprudence that a number of possibilities can be entertained. Many of the traditional sanctions are wholly appropriate to the corporate form and in addition, there are a number of new interesting possibilities. The task must be to achieve the optimal use of criminal sanctions.<sup>523</sup> That optimum contains three components- the preferred form of sanction, the appropriate cost bearer, and the certainty-severity trade off.<sup>524</sup> Fisse's call for new invigorated entity sanctions should not obscure the fact that certain traditional sanctions might in the proper context be

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<sup>517</sup> Fisse and French (Eds.), n. 4 at p. 194

<sup>518</sup> Fisse and French (Eds.), n. 4 at p. 198

<sup>519</sup> Fisse and French (Eds.), n. 4 at p. 197

<sup>520</sup> Fisse and French (Eds.), n. 4 at p. 197

<sup>521</sup> Fisse and French (Eds.), n. 4 at p. 202

<sup>522</sup> Fisse and French (Eds.), n. 4 at p. 202

<sup>523</sup> Coffee, n. 68 at p. 421

<sup>524</sup> Coffee, n. 68 at p. 421

appropriate.<sup>525</sup> It seems relatively obvious that there is a need for a diversified strategy for prevention of corporate misconduct.<sup>526</sup> Kennedy explains that 'it is the very diversity of its application that makes the corporate form a formidable barrier to effective social control. No single weapon is ideal in every situation.'<sup>527</sup> Stone suggests that we adopt a three-tiered approach to controlling corporations- the discipline of the markets, the discipline of the law, and thereafter punishment.<sup>528</sup> Certainly, there is a need for greater consumer pressure and wider information about corporate criminal activity generally.<sup>529</sup> In respect of sanctions an altogether a more holistic approach to controlling corporate crime is called for. Sentencing the corporation is no easy task. Mann, Wheeler and Sarat recognise that 'judges deal in the real world of sentencing, and may face considerations unperceived and unattended by whose concerns are dictated by current academic theorizing';<sup>530</sup> for all that, there is concern that corporate crime sentencing is not proportionate to the harm inflicted.<sup>531</sup> Geis argues that 'The first prerequisite for imposing heavier sanctions on corporate criminals involves the development of a deepening sense of moral outrage on the part of the public.'<sup>532</sup> For some the real problem is not the leniency of punishment but the failure to convict the true policy formulators.<sup>533</sup> There is a need to look beyond the power of criminal sanction on the basis that 'No system of law can flourish that relies solely on the fiat and the naked power of the State. The law must in general be compatible with what men and women perceive as sensible and just, and hence capable of attracting the spontaneous and uncoerced compliance of the great majority of persons to whom it applies.'<sup>534</sup> Punishment should be catalytic as well as inhibitory.<sup>535</sup> Corporations need to do more than simply engage in self restraint or exert inhibition. Punishment should

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<sup>525</sup> See Fisse, n. 289 at p. 108

<sup>526</sup> Kennedy, n. 51 at p. 444

<sup>527</sup> Kennedy, n. 51 at p. 481

<sup>528</sup> Kennedy, n. 51 at p. 481

<sup>529</sup> Clinard, n. 68 at p. 225

<sup>530</sup> Mann, Wheeler and Sarat, '*Sentencing The White-Collar Offender*' 1980 17 American Criminal L. R. 479-500

<sup>531</sup> Cohen n. 195 at p. 627

<sup>532</sup> Geis in Nader and Green, n. 16 at p. 185; see also Geis in Ermann and Lundman (Eds.), n. 58 at p. 282

<sup>533</sup> Dershowitz, n. 158 at p. 297; Smith, n. 68 at p. 20

<sup>534</sup> Allen, (1978) Conference Paper quoted in Fisse, n. 116 at p. 1174

<sup>535</sup> Fisse, n. 116 at p1160

catalyse compliance policies and disciplinary controls. Interventionism should be exercised with restraint but it should nonetheless be available as a weapon against the corporate criminal.<sup>536</sup> Rather than adopting the inertia and belief of invincibility of many corporate crime theorists and commentators, Cullen and Dubeck contend that 'A more realistic and encouraging agenda is not to diminish hopes by concentrating solely on the real constraints that exist, but rather to show...the possibilities of meaningfully attacking corporate crime within present arrangements.'<sup>537</sup> The international dimension must also be considered. Whilst it is easy to concede the necessity of international sanctioning methods 'to control activities which either fall between the cracks of national laws or spread one offence across a patchwork of national jurisdictions,'<sup>538</sup> developing such an approach will be extremely difficult. As a stop gap measure, the adoption of sanctioning methods reasonably congruent with those operating in other jurisdictions is a useful preliminary step in that process. Finally, in everything we do we must be alert to the unique structural dimensions to the issues of sanctioning the corporate criminal.<sup>539</sup> Those unique structural features should not however be allowed to defeat the proper sanctioning of the errant corporation.

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<sup>536</sup> Stone in Fisse and French (Eds.), n. 4 at p. 19

<sup>537</sup> Cullen and Dubeck, n. 6 at p. 8.

<sup>538</sup> Braithwaite, n. 7 at p. 374

<sup>539</sup> Cullen et al., n. 74 at p. 360.

## **5.0 Introduction**

The development of a greater understanding of corporate dynamics and demand for greater corporate social responsibility have conspired to promote a body of jurisprudence aimed at attaching criminal liability under homicide laws to the corporate entity where death ensues from their culpable actions.<sup>1</sup> Corporate crime which results in death or serious physical injury is particularly evocative. So much so that Wells claims that corporate killing now has cultural meaning.<sup>2</sup> Hills describes corporate violence as,

‘actual harm and risk of harm inflicted on consumers, workers and the general public as a result of decisions by corporate executives or managers, from corporate negligence, the quest for profits at any cost, and wilful violations of health, safety and environmental laws.’<sup>3</sup>

Irrespective of how one seeks to define corporate killing, the extinction of life attacks the public psyche in a way that no other consequence does. Deaths arising from corporate wrongdoing have heightened interest in the subject of corporate crime so much so that ‘a concrete instance of harm brings home the realities of risk in a way abstract information in the form of probabilities cannot do..Accidents create expectations and demands for action. Not only must some response be made: it must be seen to be made.’<sup>4</sup> Rose has suggested that the adverse perception of this form of criminal activity is rooted in the community rather than simply in the legal community. Large-scale disasters have been particularly important in developing public consciousness.<sup>5</sup> Significantly, there has been widespread recognition that it is only very rarely that ‘the emergence of a disaster can be fully attributed to the

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<sup>1</sup> ‘Issues of social responsibility, both towards employees in a company and to the community at large, have rightly come much to the fore in public discussion, and there is a need to consider how far it is desirable and practicable to take further account of these by statutory means.’ (DTI White Paper *Company Law Reform* (1973 Cmnd 5391 HMSO para 5); see also, *M V Herald of Free Enterprise, Report Of The Court*, No 8074 Dept of Transport 1987 para 14

<sup>2</sup> Wells ‘*Cry In The Dark- Corporate Manslaughter And Cultural Meaning*’, in Loveland (Ed.), *Frontiers Of Criminality* (1995) pp. 109-125

<sup>3</sup> S. L. Hills (Ed.), *Corporate Violence: Injury And Death For Profit*, (1987), Chapter vii

<sup>4</sup> B. M. Hutter and Lloyd -Bostock, ‘*The Power Of Accidents: The Social And Psychological Impact Of Accidents And The Enforcement Of Safety Regulations*’ 1990 30 *British Journal of Criminology* 409-412

<sup>5</sup> L. Dunford and A. Ridley, ‘*Corporate Manslaughter- Time For Reform*’ 1996 Paper at p. 1



blunders, errors or, misunderstandings of a single individual; invariably one needs to assess the contributory behaviour of several individuals but also the manner in which behaviour of these individuals is shaped by the institutions and organisations within which they act.’<sup>6</sup> Hutter and Lloyd Bostock have noted that accidents and disasters can have ‘a powerful social and psychological impact’ which create expectations and demands for action.<sup>7</sup> The correlation between the sense of outrage and the demand for the attachment of criminal liability is also recognised by Dunford and Ridley who contend ‘a prosecution[following disaster] is ‘symbolic’, representative of the public outrage which inevitably follows the incident.’<sup>8</sup> Though ‘symbolic’ and important, ‘[t]he extension of corporate liability to personal crimes of violence such as homicide does, however, pose serious theoretical, philosophical and practical difficulties.’<sup>9</sup> So much so that, according to Wells, there is a ‘clash between the popular invocation of corporate manslaughter and the legal barriers frustrating its application.’<sup>10</sup>

In modern times, prosecution of corporations under homicide crimes has been both rare<sup>11</sup> and controversial.<sup>12</sup> One of the reasons for controversy is that there has been a traditional view,

‘that the law fails to satisfy victims’ relatives when it seeks to deal with death which is brought about by gross negligence in the exercise of a lawful pursuit such as commerce and industry....where death is caused by an agency which consists of multiple persons, the law does not have a vehicle by which guilt may be properly recognised and attributed. Corporate wrongs will generally not be dealt with by the mainstream criminal justice

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<sup>6</sup> B. Turner, *Manmade Disasters*, (1978) at p. 160

<sup>7</sup> Hutter and Lloyd Bostock, n. 4 at p. 409

<sup>8</sup> Dunford and Ridley, n. 5 at p. 8

<sup>9</sup> P. B. Rodella, ‘Corporate Criminal Liability For Homicide: Has the Fiction Been Extended Too Far’ 1984 4 J. of Law and Commerce 95-126 op cit. at p. 95

<sup>10</sup> Wells, ‘Corporate Manslaughter: A Cultural And Legal Form’ <http://comlaw.rutgers.edu/crimlawforum/wells.html> at p. 4. Sentencing in fatality cases causes the courts some anxiety. see Dunford and Ridley, n. 5 at p. 6; Steyn J in *R v Kite* reported in *The Daily Telegraph*, Feb. 9th 1996, p. 3

<sup>11</sup> N. Reville, ‘Corporate Manslaughter’, 1989 Law Society’s Gazette 17; see also D. Bergman, *Deaths At Work: Accidents Or Corporate Crime - The Failures Of Inquests And The Criminal Justice System*, (1991) at p. 4

<sup>12</sup> G. A. Clark, ‘Corporate Homicide: A New Assault On Corporate Decision-Making’ 1979 54 Notre Dame Lawyer 911-924 at p. 912 describes corporate criminal liability for homicide as ‘an enigmatic concept.’

system which is seen as a system for upholding social order and protecting individual rights.<sup>13</sup>

The failure to prosecute has, unfortunately perpetuated the social perception that these crimes are not serious.<sup>14</sup> The danger is that, as Solzhenitsyn somewhat colourfully contends, 'When we neither punish nor reproach evildoers..we are ripping the foundations of justice from beneath new generations.'<sup>15</sup> According to Leigh, whilst there is nothing in theory to prevent a corporation from being held liable for an offense of violence such as murder..'The incongruity, if any, in convicting a corporation for an act of violence reflects an inarticulable premise that conditions of policy, especially deterrence, require the prosecution of natural persons.'<sup>16</sup> Corns suggests that there is a cultural and linguistic resistance to construing artificial persons, such as corporations, as "killers."<sup>17</sup> One of the inhibiting factors has been the reluctance to engage the real criminal law against the corporation.<sup>18</sup> Wells talks of an 'unconscious disquiet' at the attempt to frame a company and its officers as homicidal criminals.<sup>19</sup> However, Corns suggests that it takes sensational fatalities or large-scale disaster to engage public indignation that the corporation ought to be punished accepting that 'the role of the media in formulating and changing socio-legal perceptions in this context is critical.'<sup>20</sup> Notwithstanding the difficulties, there is a real need to reinforce the symbolic message of the criminal law.<sup>21</sup>

The dichotomy between the primary objective of the corporation as an entity and the possible damaging results of pursuit of that objective have noted by many

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<sup>13</sup> Dunford and Ridley, n. 5 at pp. 4-5

<sup>14</sup> G. Slapper, 'Corporate Manslaughter: A Examination Of The Determinants Of Prosecutorial Policy' 1993 3 Social and Legal Studies 423-443 at p. 425

<sup>15</sup> Quoted in W. Maakestad, 'States' Attorneys Stalk Corporate Murderers' 1986 56 Business and Society R. 21-25 at p. 24

<sup>16</sup> L. H. Leigh, 'The Criminal Liability Of Corporations and Other Groups: A Comparative View' 1982 80 Michigan L. R. 1508-1529 at p. 1512

<sup>17</sup> C. Corns, 'The Liability Of Corporations For Homicide In Victoria' 1991 15 Criminal L. J. 351-366 at p. 352

<sup>18</sup> Corns, n. 17 at p. 352

<sup>19</sup> C. Wells, 'Organisational Responses To The Risk Of Criminal Liability' 1995 Paper, York University, at p. 14

<sup>20</sup> Corns, n. 17 at p. 352

<sup>21</sup> C. Wells, 'The Decline And Rise Of English Murder' 1988 Criminal L. R. 788 at p. 801

commentators.<sup>22</sup> The progress engendered by corporations has not been without its social costs; it is obvious that 'Such simultaneous beneficial and detrimental aspects of corporate conduct present lawmakers with the challenge of curtailing socially harmful activity without stifling the industrial processes.'<sup>23</sup> Glasbeek and Rowland argue in respect of workplaces that,

'As all employment creates inherent risk to eliminate all risk of injury is injury, logically, one ought to eliminate all enterprise. This is obviously an unacceptable means of approaching the problem. But it is put forward because it characterizes what is at issue: it is the fact of enterprise which creates the risk. The focus of any scheme which hopes to better conditions for workers has to be the nature of and control over the enterprise.'<sup>24</sup>

In responding to the activities of the modern corporation '[a] clear case can be made for imputing to such corporations social duties including the duty not to offend all relevant parts of the criminal law.'<sup>25</sup> Given the inherent dangers in the industrial process, it seems only fitting that corporations should have social responsibility for their actions. Perceptible development of such a concept is a relatively recent phenomenon.<sup>26</sup>

Not all commentators are convinced that utilisation of the ordinary criminal law is appropriate where death ensues from corporate activity. Whilst there are those who are sceptical of the deployment of the ordinary criminal law of homicide against corporations on the basis of efficacy,<sup>27</sup> there are those who simply oppose its application on doctrinaire grounds. Rodella, for example, argues that 'Although there may be select occasions where the use of criminal sanctions against corporations for violation of person crimes is justified either because the individual responsible for the commission of the offense cannot be pin-pointed or where the inner-circle of the corporation has intentionally, or knowingly consented to

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<sup>22</sup> A. L. Helverson, 'Can A Corporation Commit Murder' 1986 64 Washington University L. Q. 967-989 at p. 976

<sup>23</sup> Spurgeon and Fagan, 'Criminal Liability For Life-Endangering Corporate Conduct' 1981 72 J. of Criminal Law and Criminology 400-433 at p. 400; V. Walters, 'The Politics Of Occupational Health And Safety' 1985 22 Canadian Review of Sociology and Anthropology 57-79 at p. 57

<sup>24</sup> Glasbeek and Rowland, 'Are Injuring And Killing At Work Crimes?' 1979 17 Osgoode Hall L. R. 506-594 at p. 511

<sup>25</sup> Turner J. in *P and O Ferries* 1991 93 Cr. App R 72, pp. 83-4

<sup>26</sup> Dunford and Ridley, n. 5 at p. 3

<sup>27</sup> See Glasbeek, 'Why Corporate Deviance Is Not Treated As A Crime- The Need to Make 'Profits' A Dirty Word' 1984 22 Osgoode Hall L. J. 126-143 at p. 126

commission of such a crime, the use of criminal sanctions for personal crimes such as homicide or involuntary manslaughter should be severely limited.’<sup>28</sup> Reilly argues that corporate criminal liability for homicide is a ‘*non-sequitur*’ and that focus should be on individual liability despite its evident difficulties.<sup>29</sup> Others have been at pains to point out that utilisation of the criminal law should not stifle corporate innovation and enterprise.<sup>30</sup> The free-marketeers see the law as a means of regulating economic activity more concerned with constraining abuses of the economic system than protecting human lives. Posner, for example, argues that ‘only a fanatic refuses to trade lives for property, although the difficulty of valuing lives is a legitimate reason for weighing them heavily in the balance when only property values are in the other pan.’<sup>31</sup> Such a view fails because it lacks compassion. Not evocative emotional compassion but rather a sympathetic understanding of the real values we wish to enshrine within our laws. The law is not simply a body of rules designed to offer a formulaire approach to the way we conduct ourselves, but rather a code designed to create a better society. In failing to recognise the fundamental sanctity of life, Posner makes a fatal calculation that life has a monetary price. Posner is not alone in defending the free-market economy. According to Glasbeek, ‘The essence of the capitalist system does not require that congruence of [individual and corporate harm] exist, that is, that corporate activity should be deemed criminal. The very relations of production, which is the law’s role to protect and encourage..inhibit such an approach.’<sup>32</sup>

Notwithstanding the recent suggestion in Anglo-American law that the crime of manslaughter<sup>33</sup> might be appropriate where death ensues from corporate

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<sup>28</sup> Rodella, n. 9 at p. 122

<sup>29</sup> D. J. Reilly, ‘*Murder Inc.: The Criminal Liability Of Corporations For Murder*’ 1988 18 Seton Hall L. R. 378-404 at p. 403

<sup>30</sup> In the Ford Pinto case in America the prosecution said that the utilisation of ordinary criminal homicide laws does ‘not desire to chill manufacturing generally, it does desire to deter outrageous decisions to sacrifice human life for private profit.’ quoted in D. S. Anderson, ‘*Corporate Homicide: The Stark Realities Of Artificial Beings And Legal Fictions*’ 1981 8 Pepperdine L. R. 367-417 at p. 369

<sup>31</sup> Posner (1981,83-4) quoted in Glasbeek, n. 27

<sup>32</sup> Glasbeek, n. 27 at p. 131

<sup>33</sup> It has been claimed that, ‘manslaughter marks the border between homicides to which criminal blame attaches, and deaths regarded as accidental or to which no criminal blame otherwise attaches’ Wells, n. 10 at p. 3

wrongdoing, it was previously believed such crimes could not be committed by a corporation.<sup>34</sup> Up until the early 1990s there had only been three prosecutions of corporations for manslaughter in England.<sup>35</sup> Corresponding prosecutions in America had been more prevalent. There have been no such prosecutions in Scotland. The reluctance to prosecute under traditional homicide law can be explained by the absence of criminal intent, the inability to suitably punish the corporation and, ultimately, on the basis of public policy.<sup>36</sup> It was growing concern about fatalities ensuing from corporate activities that prompted attempts in England to deploy the crime of manslaughter against corporations. Reilly contends that 'The criminal law has followed an erratic and often unreasoned path from the proposition that a corporation could not commit any crime, to the modern notion that a corporation is capable of manslaughter.'<sup>37</sup> In England it was believed the cases of *R v Sullman*, *R v Prentice*, *R v Adomako* and *R v Holloway*<sup>38</sup> opened up new dimensions to the crime of manslaughter on the basis that someone may be guilty of gross negligence in the absence of an indifference to an obvious and serious risk.<sup>39</sup> Long foresaw the possibility where a new offence and 'less cumbersome' offence of manslaughter might be aimed at companies who negligently cause death. He concluded that 'after years of stagnation the law of corporate manslaughter is in the process of rapid and radical change.'<sup>40</sup> Irrespective of this, the current position is that prosecutions are still to be considered last resort actions. Inevitably, cases are likely to be complex and, hotly contested.<sup>41</sup>

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<sup>34</sup> Law Commission *Legislating The Criminal Code: Involuntary Manslaughter* Consultation Paper (1994) para 4.21, at p. 97; see also *R v Cory Bros. Ltd.* [1927] 1 KB 810 cf. *R v. ICR Haulage* [1944] 1 KB 551 per L.J. Stable at p. 556; Northern Strip Mining Construction Co. Ltd; P and O Ferries (Dover) Ltd. (1991) 93 Crim. L. R. 72

<sup>35</sup> *R v Cory Bros.* [1927] 1 KB 810; Northern Strip Mining Construction Co. Ltd *The Times* 2, 4 and 5 Feb. 1965; P&O European Ferries(Dover) Ltd (1991) 93 Cr. App R 72 (CCC); For recent prosecutions see HSIB, 'Double First For Manslaughter Convictions Over Lyme Bay Tragedy' January 1995 at p. 2; HSIB, August 1995, at p. 2

<sup>36</sup> See J. M. Hickey, 'Corporate Criminal Liability For Homicide: The Controversy Flames Anew' 1981, California Western L. R. 465-492 at p. 446

<sup>37</sup> Reilly, n. 29 at p. 378

<sup>38</sup> (1994) QB 300 (CA)

<sup>39</sup> A. Long, 'Corporate Manslaughter: The Offence Of The Future' 1993 *The Safety and Health Practitioner* 25

<sup>40</sup> Long, n. 39 at p. 25

<sup>41</sup> Dunford and Ridley, n. 5 at p. 14



One of the principal reasons why there has been increasing focus on traditional homicide laws has been the perceived inadequacy of existing statutory health and safety laws. These statutory crimes are framed in a particular way which takes no cognisance of the fact that death has ensued. This stands in marked contrast to common criminal offences.<sup>42</sup> One of the other unfortunate features of Health And Safety At Work Act 1974 (hereinafter HASAWA) is that criminally negligent conduct which results in death is only punishable by a fine whilst certain non-compliance duties are punishable by imprisonment.<sup>43</sup> Bergman wants all prosecutions for workplace deaths to be triable on indictment and he calls for the creation of a number of new statutory offences which focus of causing injury or death through criminal negligence. Interestingly, he demands that their should be a dual operation of the law so that liability falls on the company and the company officer.<sup>44</sup> He also calls for an intermediate offence of recklessly causing the death of a person<sup>45</sup> applicable to corporations and triable on indictment, and responsibility attribution not to be based on the need to attribute fault to individuals within the corporate form. He also foresees a need for a change in prosecutorial attitudes.<sup>46</sup>

Bergman is not alone in adopting the view that public indignation is not satisfied by punishing the breach rather than the consequences of the breach of the health and safety provision.<sup>47</sup> According to Geis, 'corporate criminals deal death not deliberately but through inadvertence, omission and indifference because their overriding interest is self-interest' and importantly '[S]ince the public cannot be armed adequately to protect itself against corporate crime, those law enforcement agencies acting its behalf should take measures sufficient to protect it.'<sup>48</sup> Despite prosecutorial policy in respect of corporate manslaughter being rooted in the economic structure and operating precepts of the commercial system,<sup>49</sup> there has been growing pressure to apply ordinary homicide laws to corporations or at least to

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<sup>42</sup> Bergman, n. 11 at p. 31

<sup>43</sup> Bergman, n. 11 at p. 31

<sup>44</sup> Bergman, n. 11 at p. 32

<sup>45</sup> Bergman, n. 11 at p. 33

<sup>46</sup> Bergman, n. 11 at p. 34

<sup>47</sup> See Dunford and Ridley, n. 5 at p. 6

<sup>48</sup> G. Geis, 'Criminal Penalties For Corporate Crime' 1972 8 Criminal. B. 377-392 at p. 386

<sup>49</sup> Slapper, n. 14 at p. 440

apply an offence equally opprobrious to corporations where death ensues from their wrongdoings. Somewhat infortuitously, as this thesis neared completion, the British Government announced proposals to introduce a new offence of corporate killing. It is not known whether the offence, founded on proposals of the English Law Commission, is to be extended to Scotland.<sup>50</sup> Whilst such an offence may draw much of the thunder from the calls for reform they do not defeat the essential premise on which this thesis is predicated. A new offence of corporate killing applicable in Scotland represents only a small reform when what is argued for in this thesis is a complete overhaul of corporate criminal liability. The danger is that they will deflect attention from the general issue and the patch and paste reform will impede the wholesale reform which I believe is both necessary and overdue. Woolfson chides Scottish legal academics for displaying a 'patrician disdain' for growing public concern on the issue and for a failure to call for reform in Scotland.<sup>51</sup> His are legitimate concerns. Cultural lag must not however give way to slavish imitation. The supposed genius of our law and our lawyers can ensure an altogether more complete solution.

### 5.1 The Nature And Extent Of Corporate Killing

Those who argue for greater intervention by the criminal law into the activities of corporation can point to a wealth of statistical information which illustrates the sheer magnitude of the physical damage occasioned by corporations. For example, it is estimated that the solitary instance of the disaster at Bhopal alone resulted in 2,500 to 10,000 deaths.<sup>52</sup> Boden and Wegman estimate workplace deaths in America at roughly 14,000 per annum, with 2 million injuries and deaths from job related illnesses at 200,000.<sup>53</sup> The President's Report on Occupational Safety and Health 1972 estimates deaths from work related diseases at 100,000.<sup>54</sup> Spurgeon and Fagan

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<sup>50</sup> See Woolfson 'Rising Toll Of Deaths In The Workplace' The Herald 27th November 1997; Vaughan 'Courts Get Tough With The Corporate Killers' The Herald 15th November 1997

<sup>51</sup> See Woolfson. n 50

<sup>52</sup> See T. Jones, *Corporate Killing - Bhopals Will Happen*, (1988) at p. 1. For a full account of the Bhopal tragedy see P. Muchlinski, 'The Bhopal Case: Controlling Ultra Hazardous Industrial Activities Undertaken By Foreign Investors' 1987 50 Modern L. R. 545-587.

<sup>53</sup> Boden and Wegman, *Working Papers For A New Society* May -June 1978, at p. 43; quoted in Glasbeek and Rowland, n. 24 at p. 509

<sup>54</sup> *President's Report On Occupational Safety And Health* (1972) at p. 111

have also made an attempt to catalogue the horrendous workplace death figures.<sup>55</sup> It is a fact that more Americans are killed each year in the workplace than were killed in Vietnam.<sup>56</sup> Caudhill estimates that by 1968 there were nearly 250,000 respiratory victims of coal mining in America and that there had been 100,000 deaths since the beginning of mining.<sup>57</sup> He claims that 'accidents occur with numbing frequency.'<sup>58</sup> Tobacco manufacturers have also been heavily criticised in the USA; Clinard estimates that there have been 395,000 deaths per annum in America from tobacco related diseases.<sup>59</sup> Clinard also catalogues a heavy toll of consumer fatalities in the United States<sup>60</sup> The statistics reveal a simple truth- corporations kill far more people than individuals.<sup>61</sup>

Here in the United Kingdom statistics for 1989/90 record that 426 people died from workplace incidents. 21,000 suffered non-fatal major injuries and 16,000 suffered serious injuries. The HSE estimate that 70 % of those incidents were preventable.<sup>62</sup> Some 572 people were killed at work or in commerce related matters in 1990/91.<sup>63</sup> Infamous disasters such as Zeebrugge and King's Cross 'represent the fluorescent tip of a submerged but ever present iceberg.'<sup>64</sup> Slapper estimates that 600 persons each year are killed in work related incidents.<sup>65</sup> Since 1965 (the first case of corporate manslaughter) some 19,000 have been killed. Slapper notes that, of the few cases a year referred by the HSE to the Crown prosecution Service, very few proceed for want of evidence.<sup>66</sup> He estimates that accidents at work and the impact of resulting health bills cost industry and the state up to £15 billion pounds a year. The most

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<sup>55</sup> Spurgeon and Fagan, n. 23 at p. 402

<sup>56</sup> K. Brickey, 'Death In The Workplace: Corporate Liability For Corporate Homicide' 1987 2 Notre Dame J. of Law, Ethics and Public Policy 753-790 at p. 775

<sup>57</sup> The death rates in other nations including the UK are detailed in Caudhill, in Hills (Ed.), n. 3 at p. 94

<sup>58</sup> Hills (Ed.), n. 3 at p. 93

<sup>59</sup> M. Clinard, *Corporate Corruption: The Abuse Of Power*, (1990) at p. 106

<sup>60</sup> Clinard, n. 59 at p. 100

<sup>61</sup> Clinard, n. 59 at p. 91

<sup>62</sup> Bergman, n. 11 at p. 3

<sup>63</sup> HSE statistical bulletin 1992; G. Slapper, 'Where The Buck Stops' 1992 142 New L. J. 1037-1038 at p. 1037 contrasts this with the approximately 150 ordinary cases of reckless manslaughter for non-corporate crimes.

<sup>64</sup> Wells, n. 21 at p. 791

<sup>65</sup> G. Slapper, 'Crime Without Punishment' The Guardian Feb. 1st 1994 at p. 19

<sup>66</sup> Slapper, n. 65 at p. 19

recent statistics nonetheless reveal that workplace fatalities fell in 1995; with 190 employees killed in year to April 1995 (expected to increase to 203). There was also a decrease in the number of prosecutions from 1,793 to 1,789.<sup>67</sup> One can almost deduce a hierarchy of dangerous industries. Coke ovens, open cast coal, coal, and railways are particularly hazardous. Construction ranks as the 15th most dangerous, whilst extraction of minerals oils and gas rank 22nd.<sup>68</sup> Looking at fatalities alone, extraction of minerals oil and gas ranks highest with 25 deaths per 100,000.<sup>69</sup> There has been a particularly heavy death toll in North Sea.<sup>70</sup> The frontier image of early offshore exploration cultivated an image of necessary sacrifice.<sup>71</sup> The Ocean Odyssey Fatal Accident Inquiry and the Cullen Inquiry into Piper Alpha revealed an 'industry where huge financial outlays in the exploration for oil had generated a routinely reckless culture of risk taking in which shutting- down of operations was almost unthinkable.'<sup>72</sup> Whilst it is true that the 'mere recital of damning figures does not justify dubbing corporations criminals',<sup>73</sup> the statistics go some way to explaining and endorsing public and academic concern about the issue of corporate homicide.

## 5.2 Corporate Homicide, Perceptions Of Real Crime And The Response Of Corporations

Radin has claimed that 'The criminal label traditionally attaches itself only to conduct that is judged particularly worthy of the moral condemnation of the community. A formal statement of guilt manifests this condemnation, and a moral stigma attaches itself to the guilty. Criminal law is thus the law's "most powerful weapon" and should be reserved for behaviour which 'excites the sense of indignation and outrage.'<sup>74</sup> One of the major problems in tackling corporate

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<sup>67</sup> HSE Annual Report 1992/3

<sup>68</sup> HSE Annual Report 1992/3

<sup>69</sup> Woolfson, Foster and Beck, *Paying For The Piper- Capital And Labour In Britain's Offshore Oil Industry*. (1997), at p. 405

<sup>70</sup> Carson in P. Wickman and T. Dailey (Eds.), *White Collar And Economic Crime*, (1982) at p. 175

<sup>71</sup> Carson, *The Other Price Of Britain's Oil* (1982) at p. 44; Woolfson, Foster and Beck, n. 69 at p. 369

<sup>72</sup> Woolfson et al., n. 69 at p. 413

<sup>73</sup> Wells, n. 21 at p. 792

<sup>74</sup> S. Radin, 'Corporate Criminal Liability For Employee-Endangering Activities' 1983 18 Columbia Journal of Law and Society Problems 39-75 at p. 50

homicide is the perception that it is not 'real crime' and as such not worthy of true condemnation. Fatalities are often couched in euphemistic and misleading terminology<sup>75</sup> and this serves to reinforce the notion that such deaths are not on a par with other homicides.<sup>76</sup> Whilst it is true that in a modern technological society, some risk of death is unavoidable or may not be practically avoided,<sup>77</sup> it remains the case many fatalities can be avoided. Simply to define workplace and other fatalities ensuing from the industrial process as 'accidents' is, as one commentator contends, a denial of injury.<sup>78</sup> McColgan explains that

'The very use of the word "accident" in the context of workplace and transport deaths itself functions as a block to the perception of those deaths as criminally caused...Without substantial change in the institutional reaction to workplace and transport deaths, the [European] Commission's proposals for changes to corporate liability will be of little consequence.'<sup>79</sup>

Long claims that even safety representatives and experienced safety practitioners do not regard breaches of health and safety law as 'real crime.'<sup>80</sup> Bergman meanwhile talks of the 'decriminalisation' of workplace deaths.<sup>81</sup> Bergman's view is that 'this 'violence' is rarely defined in the vocabulary of the criminal justice system. No criminals are caught; workers are never considered the victims of assault, battery or manslaughter, but simply 'accidents.' There are no police investigations, no Crown court trials, and no sentences of imprisonment in such cases. Companies only have to face an inspector from the HSE, a half hour hearing in the magistrates court...and a fine of a few hundred pounds. such prosecutions are scarce in any case.'<sup>82</sup> One of the ways in England in which the perception of death is altered from 'acceptable' to 'unacceptable' revolves round the clear correlation between inquests and

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<sup>75</sup> Bhopal was described as an incident by UCC (see Jones, n. 52 at p. 9) *The Public Inquiry Into The Piper Alpha Disaster* (1990) Cmnd. 1310 Paragraph 2.15 Lord Cullen says 'I treated the 'accident' as comprehending all that involved loss of or danger to life from the stage of the initial ignition to the stage when the last survivor reached help.'

<sup>76</sup> Slapper, n. 14 at p. 429; Carson, n. 71 at p. 55

<sup>77</sup> Spurgeon and Fagan, n. 23 at p. 432 op cit.

<sup>78</sup> Hills (Ed.), n. 3 at p. 196

<sup>79</sup> McColgan, 'The Law Commission Consultation Document On Involuntary Manslaughter' 1994 Criminal L. R. 547-557 at pp. 556-7

<sup>80</sup> Long, n. 39 at p. 24

<sup>81</sup> Bergman, n. 11 at p. 15

<sup>82</sup> Bergman op cit., n. 11 at p. 3



manslaughter charges. It remains the case that findings of unlawful killing are more likely to lead to the bringing of a manslaughter charge in England.<sup>83</sup>

Though there does appear on the face of things to be State tolerance to certain fatalities,<sup>84</sup> there is a palpable and understandable need that corporate homicide is punished appropriately. That need arises because,

‘There are indisputably some cases where a corporation’s wrongful intent combines with the seriousness of its conduct to create the degree of moral culpability required for criminal sanctions. Under such circumstances, there is a genuine social need for the imposition of the stigma of criminality.’<sup>85</sup>

There are commentators who perceive that the deaths which ensue from corporate activities are qualitatively different from other killings and that we should accordingly deal with corporate killers differently.<sup>86</sup> Corporations play their own part in shaping the perception of crime. Some writers are extremely critical of the corporate response to fatalities arising out of their activities. Many cite examples of over-zealous corporate defensiveness and open hostility to accusers. Jones for example in assessing Union Carbide’s reaction to the horrendous tragedy of Bhopal claims,

‘in the ensuing macabre dance of death, the dead and the walking wounded were left by the wayside, while the main protagonists acted to minimise damage to their own interests.’<sup>87</sup> ‘UCC responded to Bhopal with lies, half truths, misinformation and publicity gestures; attempted to shift the blame to its employees and its subsidiary company; and overall showed itself more concerned with protecting its continued existence and profitability than with ameliorating the damage it had caused.’<sup>88</sup>

Jones notes UCC’s approach was to manage the crisis in the metropolitan countries more so than in India itself. There were a number of gestures to control public opinion. As the crisis developed, UCC distanced itself from its subsidiary.<sup>89</sup>

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<sup>83</sup> Bergman, n. 11 at pp. 8-11; C. Wells, ‘*Inquests, Inquiries And Indictments: The Official Reception Of Death By Disaster*’ 1991 11 Legal Studies 71 at p. 82

<sup>84</sup> Wells, n. 21 at p. 788

<sup>85</sup> Radin, n. 73 at p. 68

<sup>86</sup> See Seney, ‘*The Sibyl At Cumae - Our Criminal Law’s Moral Obsolescence*’ 1971 17 Wayne L. R. 777-858 at p. 819

<sup>87</sup> Jones, n. 52 at p. 3

<sup>88</sup> Jones, n. 52 at p. 14

<sup>89</sup> See Jones, n. 52 at p. 33

Moreover, the Chief Executive sought to blame the workforce and individuals as primarily responsible as opposed to the officers of the company.<sup>90</sup> There are many instances where the corporation's initial response when confronted with the consequences of their conduct is to seek to blame the victim.<sup>91</sup>

One is left then with a situation where the statistics are horrendous and at the same time elements within society downplay the significance of the problem. The conspiracy that ensues ensures that the crime is not adequately prosecuted or punished. However, the growing consensus that something requires to be done blows apart when one turns to what should be done and how. England appears to be heading a system where corporate killing is recognised as a specific offence and that certainly is one plausible solution. Alternatively, there might have been an attempt to develop the law to more readily apply traditional homicide offences to corporations. Ironically, of the offences against the person, these remain best suited for adaptation and application to the corporate form. The failure to apply them is both political and practical rather than theoretical. The application of homicide crimes to corporation applying a new mechanism of corporate fault attribution without any modification to the *actus reus* of the crimes is eminently possible.<sup>92</sup>

### **5.3 Corporate Homicide - A Brief International Perspective**

The limited genealogy of the utilisation of homicide offences against corporations in the UK is not replicated in other common law jurisdictions. In America, in particular, there is extensive jurisprudence on the subject. The development of that jurisprudence has nonetheless faced similar difficulties as those now being encountered in England. Maakestad suggests two reasons for the sporadic and almost haphazard prosecution for homicide cases in the American State courts explaining that 'few States were developing a cohesive theory of corporate criminal liability. As a result there lingered in State courts a variety of conceptual, definitional and constitutional issues that made most corporate prosecutions-

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<sup>90</sup> See Jones, n. 52 at p. 37

<sup>91</sup> Hills (Ed.), n. 3 at p. 197; Miles W. Lord, US District Judge for Minnesota, statement to Executives of the Robins Corp. Quoted in Clinard, n. 59 at p. 105

<sup>92</sup> See chapter 6 of this thesis

especially for serious intent crimes like homicide- legal obstacle courses.<sup>93</sup> In addition to this, there was less enthusiasm for diverting scarce resources away from the prosecution of 'street crime.' In America the situation is determined principally by whether manslaughter is defined in common law or in statute.<sup>94</sup> Swigert and Farrell suggest that the 'failure to sustain indictments against corporations lies less in the logic of corporations as potential offenders and more in the language of particular State or federal statutes. Most typically, homicide is defined in these codes as the criminal slaying of "another human being" with "another" referring to the same class of beings as the victim.'<sup>95</sup> Moreover, homicide statutes in most jurisdictions are construed strictly,<sup>96</sup> 'Despite courts' willingness to hold a corporation criminally accountable for homicide, corporations still avoid criminal accountability because of narrowly written vague and ambiguous homicide statutes.'<sup>97</sup> The debate surrounding the efficacy of using ordinary homicide laws in situations involving corporations in the United States, as in the UK, is intertwined with the enforcement of regulatory health and safety laws. There is a view that deregulation of enforcement, and the failure of regulation generally, has led to utilisation of ordinary criminal law in America.<sup>98</sup>

Not everyone is enamoured of most States endorsement of the application of ordinary homicide laws to American corporations. Reilly notes what he describes as the American courts preoccupation with the ability to hold corporations liable for manslaughter without addressing the policy issue as to whether they should be

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<sup>93</sup> W. Maakestad, 'Corporate Homicide' 1990 140 New L. J. 356 at p. 357

<sup>94</sup> See S. J. Wragg, 'Corporate Homicide: Will Michigan Follow Suit?' 1984 62 University of Detroit L. R. 65-85 at pp. 70-77

<sup>95</sup> Swigert and Farrell, 'Corporate Homicide: Definitional Process In The Creation Of Deviance' 1980 15 Law and Society Review 161-182 at p. 165 Cf. *People v Ebasco Services Inc.* 77 Misc. 2d 784, 354 NYS 2d 807 (Sup Ct 1974) the case turned on whether the new Penal Code for New York permitted person to include a corporate defendant. The court adopted a differential approach to the perpetrator and the victim holding that the former could be an inanimate person whilst the latter was not.

<sup>96</sup> See *Kelley v State* 233 Ind 294 (1954) at p. 298

<sup>97</sup> Helverson, n. 22 at p. 972

<sup>98</sup> Maakestad, n. 93 at p. 357; see Boehringer, 'Corporate Murder In The USA' 1985 10 Legal Services Bulletin 299-300 at p. 299; K. Calavita, 'The Demise Of The Occupational Safety And Health Administration' 1983 30 Social Problems 437-448

liable.<sup>99</sup> Wragg bemoans the attachment of corporate liability for homicide claiming that,

‘In the space of eighty years, the state of our criminal law has grown to accept, as basic doctrine, that the corporate entity may be liable for an act of homicide. Liability has been imposed without recognising the limitations of the ‘corporate fiction’ tool and without analysing the effectiveness of a conviction in achieving the ends sought. The better course of action would be to encourage prosecutors to charge, and judges and juries to convict, individuals within the corporation whose wrongful conduct results in a homicide.’<sup>100</sup>

According to Hickey, the position in America is that ‘[A] crime so grievous as criminal homicide, once thought to be incapable of commission by a business corporation is now something that corporate directors, officers and agents must be aware of in their business life.’<sup>101</sup>

The Model Penal Code has acted as catalyst in the creation of a much more consistent approach in the various American States.<sup>102</sup> Nonetheless, there are still variations from State to State and not all commentators express satisfaction with the contribution of the Model Penal Code. Clark for example argues that,

‘the Model Penal Code, like most criminal codes, fails, by its language alone, to resolve the ambiguity surrounding corporate criminal liability for homicide. The absence of substantial case law adds further confusion. Although some commentators endorse compatibility of homicide and corporate criminal liability, the courts are bound to resolve the inherent statutory ambiguities in terms of legislative intent. Paradoxically, the ambiguity found in the penal codes subjects the issue to judicial resolution without legislative guidance.’<sup>103</sup>

In America, the first corporate criminal indictment for homicide offences occurred in *Commonwealth v Punxsutawny Street Passenger Railway Company*<sup>104</sup> albeit that the court in this particular case held that a corporation could not be indicted for crimes

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<sup>99</sup> Reilly, n. 29 at p. 399; See also Mueller, ‘Mens Rea And The Corporation’ 1957 19 University of Pittsburgh L. R. 21-48 at p. 23

<sup>100</sup> Wragg, n. 94 at p. 85

<sup>101</sup> Hickey, n. 36 at p. 484

<sup>102</sup> Maakestad, n. 93 at p. 357

<sup>103</sup> Clark, n. 12 at p. 918

<sup>104</sup> (24 Pa Co 25 (1900)) see also *Commonwealth v Illinois Central Railroad Co.* 152 KY 320, 153 SW 459 (1913)

of violence which required criminal intent. A contrary opinion on corporate criminal intent was reached in *People v Rochester Railway and Light Company*,<sup>105</sup> but the first case where an indictment for homicide was sustained was *State v Lehigh Valley Railroad*.<sup>106</sup> In America, *Van Schaick* held that the absence of appropriate punishment did not preclude the conviction for manslaughter.<sup>107</sup> In *Lehigh Valley* the court said 'we do not consider whether the modification of the common law by our decisions is to be justified by logical argument; it is confessedly a departure at least from the broad language in which the earlier definitions were stated, and a departure made necessary by changed conditions if the criminal law was not to be set at naught in many cases, by contriving that the criminal act should be in law the act of the corporation.'<sup>108</sup> This it has been argued represented a refusal to recognise conceptual barriers to corporate criminal liability.<sup>109</sup>

The American case of *People v Film Recovery Systems in 1985* offers a further illustration of a corporation being prosecuted for manslaughter.<sup>110</sup> A Polish immigrant worker collapsed and died from cyanide poisoning. His job in common with other employees was to recover silver from x-ray film. This was done by way of cutting the film and dissolving it in large vats of sodium cyanide. The company had failed to institute improvements in respiratory equipment or indeed to ventilation generally. There was evidence that warning signs had been deliberately removed from chemical containers. The failures were against a backdrop of ongoing complaints from employees. The company president, safety manager and foreman were convicted of murder while the corporation was convicted of manslaughter. One of the executives remained in Utah and the State Governor refused extradition. The case was widely reported in America and resulted in analogous prosecutions in

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<sup>105</sup> 194 N Y 102, 88 NE 22 (1909); A view supported in *New York Central and Hudson River RR Co v US* 212 US 481 (1909)

<sup>106</sup> *Company* 90 NJL 372, 103 A 685 (1917); See also *People v Ebasco Services Inc.* 1974 77 Misc. 2d 784 (Sp. Ct. 1974)

<sup>107</sup> See Clark, n. 12 at p. 913

<sup>108</sup> 90 NJL 372, 103 A 685 (1917)

<sup>109</sup> Clark, n. 12 at p. 915

<sup>110</sup> See M. B. Bixby, 'Was It An Accident Or Murder? New Thrusts In Corporate Criminal Liability' 1990 41 Labour L. J. 417-423 at pp. 417-8; G. Boehringer, n. 98 at p. 299; Frank in Hills (Ed.), n. 3 at p. 103



other American States.<sup>111</sup> Bixby claims that the prosecution was brought because of a perception of failure on the part of the Occupational Safety and Health Administration to aggressively enforce its rules and regulations.<sup>112</sup> Moreover, he cites one District Attorney as saying 'if mercury can put holes in someone's brain, that's not much different from a gun putting a hole in someone's brain.' The case is symbolic and importantly that symbolism is not,

'as clearly communicated through modern, specialized laws that deal with health and safety problems in technical terms. Though criminal penalties may attach to many of these specialized crimes against health and safety, the stigma associated with those charges is not the same as the stigma that attaches to a conviction for manslaughter, murder, or reckless homicide.'<sup>113</sup>

Another interesting American illustration occurred in the *Warner-Lambert* case. In a factory owned by the *Warner Lambert Corporation* more than 50 employees were injured and there were 6 fatalities. Corporate decisions as to the level of explosive dust were blamed. The incident took place during the final eight hour shift of six day week working. The company was making \$400,000 a day from its *Freshen Up* gum product. The company's insurers inspected the plant some months earlier and recommended various measures to reduce the dust generated by the manufacturing process. The dust was often as thick as fog.<sup>114</sup> In 1981 the corporation and four officials were indicted for manslaughter and criminally negligent homicide following the death of six workers in a dust explosion and fire. For both crimes there was a requirement that there is a risk which is both substantial and unjustifiable. The essence of manslaughter is an awareness of the risk coupled with a disregard of that risk whereas failure to perceive the risk is implicit in criminal negligence.<sup>115</sup> In *Warner Lambert* the indictments were dismissed because, although there was a broad risk of explosion from substances used in the workplace, the court was not prepared to hold that evidence justified foreseeability of the actual explosion. It would appear that in America following *Warner Lambert* that before indictments will be upheld, there is a need to prove that the accused actually foresaw

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<sup>111</sup> Bixby, n. 110 at p. 418

<sup>112</sup> Bixby, n. 110 at p. 418

<sup>113</sup> See Frank, in Hills (Ed.) n. 3 at p. 106

<sup>114</sup> For background see Radin, n. 74

<sup>115</sup> See S. R. Weinfeld, 'Criminal Liability Of Corporate Managers For Deaths Of Their Employees: *People v Warner-Lambert Co.*' 1982 46 Albany Criminal L. R. 655-685 at pp. 656-7

or should have foreseen the cause of death.<sup>116</sup> This level of foreseeability creates substantial problems in respect of causation. Following *Warner Lambert* foreseeability is now a distinct and important factor in the element of causation.<sup>117</sup> Such an approach clearly pushes individual liability to the lower echelons of the organisation. Ironically these individuals may have least power to prevent the harm occurring. In Weinfeld's view,

'Any standard used to determine this level of personal accountability should further the purposes behind imposing penal sanctions in the corporate sector. These sanctions must deter individual misconduct and encourage affirmative action by responsible corporate agents who are aware of the harmful conditions and have sufficient power and responsibility to prevent or correct those.'<sup>118</sup>

In the now infamous Ford Pinto case, the Ford Motor Corporation were charged with reckless homicide following the deaths of three teenagers travelling in a Ford Pinto which was hit in the rear by a speeding van. The initiation of proceedings against the corporation itself caused some surprise.<sup>119</sup> Ford had prepared a cost-benefit analysis of the hazard in their Pinto vehicle which disclosed that an \$11 fuel tank shield would have prevented the problem.<sup>120</sup> Their cost-benefit analysis also disclosed that this was likely to be more expensive than compensation payable for the inevitable fatalities. The case represented a remarkable departure in that the company was not charged with a regulatory infraction.<sup>121</sup> Clark conceived that the Ford Pinto case might mark the 'beginning of a new assault on corporate decision-making.'<sup>122</sup> Following the Ford Pinto case there has been a growing number of cases accusing corporations of violent crimes in America.<sup>123</sup>

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<sup>116</sup> Weinfeld, n. 115 at p. 659

<sup>117</sup> Weinfeld, n. 115 at p. 672 op cit.

<sup>118</sup> Weinfeld, n. 115 at p. 676

<sup>119</sup> Hickey, n. 36 at p. 465; Dowie in Hills (Ed.), n. 3 at pp. 11-29

<sup>120</sup> Dowie in Hills (Ed.), n. 3 at p. 4

<sup>121</sup> Clark, n. 12 at p. 911

<sup>122</sup> Clark, n. 12 at p. 911

<sup>123</sup> Cullen, Maakestad and Cavender, *Corporate Crime Under Attack: The Ford Pinto Case And Beyond*, (1987) at p. 312; J. E. Stoner, 'Corporate Criminal Liability For Homicide: Can The Criminal Law Control Corporate Behaviour' 1985 38 South-Western L. J. 1275-1296 at p. 1275

Another notorious case of corporate wrongdoing in the United States concerned the marketing of the lethal Dalkon contraceptive diaphragm shield.<sup>124</sup> Mintz claims 'The shield created a disaster of global proportions because a few men with little on their minds except the pursuit of megabucks made decisions, in the interests of profit, that exposed millions of women to serious infection, sterility, and even death.'<sup>125</sup> She estimates that the Dalkon Shield killed hundreds and possibly thousands of women outside the USA.<sup>126</sup> In condemning the company A H Robins she says they,

'knowingly and wilfully put corporate greed before human welfare; suppressed scientific studies that would ascertain safety and effectiveness; concealed hazards from consumers, the medical profession, and government; assigned a lower value to foreign lives than to American lives; behaved ruthlessly towards victims who sued; and hired outside experts who would give accommodating testimony. Yet almost every other major drug company has done one or more of these things, some have done the repeatedly or routinely, and some continue to still to do so.'<sup>127</sup>

Canada is similar to USA in that where crimes of violence are involved the prosecuting authorities prosecute individuals rather than corporations.<sup>128</sup> Indicative of this approach are two case illustrations. First in *Canada Regina v Great Western Laundry Co.*<sup>129</sup> the court declined to hold a corporation criminally liable for manslaughter when a female employee was killed when her skirt became entangled on a rotating machine shaft. The court dismissed the case on the absence of precedent and drew sustenance from the fact that a corporation could not be appropriately punished. In *Regina V Union Colliery Co.*<sup>130</sup> it was held that a corporation could be criminally negligent but not be guilty of manslaughter where negligence resulted in death.<sup>131</sup>

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<sup>124</sup> Discussed in Clinard, n. 59 at p. 104

<sup>125</sup> Mintz in Hills (Ed.), n. 3 at p. 30

<sup>126</sup> Mintz in Hills (Ed.), n. 3 at p. 32

<sup>127</sup> Mintz in Hills (Ed.), n. 3 at p. 38

<sup>128</sup> Leigh, n. 16 at p. 1513

<sup>129</sup> 13 Man R (1900)

<sup>130</sup> 7 BCR 247 (Crim App 1900)

<sup>131</sup> Cf. R v East Crest Oil Co 3 DLR. 535 (Alberta App Div. 1944)

In the State of Victoria (Australia) murder is a common law offence defined as occurring where a person of sound mind and discretion unlawfully kills any reasonable creature in being and under Queen's peace with intent to kill or cause grievous bodily harm and the death following within a year and a day.<sup>132</sup> Like most jurisdictions recklessness has redefined the common law definition. In *Crabbe* it was said,

'If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting that death or grievous bodily harm will be the likely result, for the word 'probable' means likely to happen. The state of mind is comparable with an intention to kill or to do grievous bodily harm',<sup>133</sup>

The penalty for murder in Victoria is dictated by section 3 of the Crimes Act 1958 which dictates that the penalty shall be imprisonment for life or such other term as the court may decide. There is no scope for the imposition of a fine or other non-custodial disposition. Such an approach impedes prosecution for murder<sup>134</sup> Corns suggests the adoption of section 4b of the Commonwealth Crimes Act 1914 which provides,

*'(2A) Where a natural person is convicted of an offence against a law of the Commonwealth in respect of which a court may impose a penalty of imprisonment for life, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding \$200,000*

*(3) Where a body corporate is convicted of an offence against a law of the Commonwealth, the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to 5 times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence.'*<sup>135</sup>

In Australian Federal law involuntary manslaughter arises where there is an absence of intent but death ensues from negligence or some unlawful and dangerous act or the intention to inflict bodily harm.<sup>136</sup> Although a maximum term of imprisonment

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<sup>132</sup> Corns, n. 17 at p. 353

<sup>133</sup> (1985) 156 CLR 464 at p. 469

<sup>134</sup> Cf. *ICR Haulage Ltd* [1944] 1 KB 551 at p. 554

<sup>135</sup> Corns, n. 17 at p. 354

<sup>136</sup> See *Nydam* [1977] VR 430; *Holzer* [1968] VR 481; Corns, n. 17 at p. 356

of 15 years is proscribed by the Crimes Act 1958 section 5 there is the possibility of a fine as an alternative. Clearly, the logistical problem of punishing the corporation does not pertain to this particular crime and as such Corns asserts that there is no legal barrier to prosecuting a corporation for manslaughter.<sup>137</sup> In support of this he cites Fisse who argues that,

‘intention, recklessness or negligence can be attributed to a body corporate. Moreover, it is well established at common law that unlawful homicide does not necessarily require a killing by a human being; it is sufficient that the entity causing death is a legal person, whether human or corporate.’<sup>138</sup>

The Anglo-American jurisdiction experience points the way to how we might approach the development of the full application of existing homicide laws to corporations. It is possible to conclude that corporations can be tried under existing laws whether they be statutory or common law based. Our own homicide laws are contained in the common law crimes of murder and culpable homicide. Ultimately, we must decide whether the common law crimes should be applicable to corporations. Given the experience in England, America and elsewhere, there seems no substantial theoretical reason why these crimes should not be applied. Culpable homicide does not confront the barrier of the mandatory penalty which attaches to murder. Intellectually and practically it is a crime which fits the circumstances of corporate homicide. *Prima facie* the only impediment to murder would appear to be the issue of sanction. It may simply ‘boil down’ to a question of choice; are we so wedded to the attachment of life imprisonment for murder that we consequentially exclude it from consideration, or are we determined to apply criminal law to corporations in an effort to deter and sanction their criminality.

#### **5.4 Prosecution Of Corporate Homicide**

The principled objections to corporate liability *per se*, and corporate liability under homicide laws, have already been noted. There is a considerable body of opinion whose concern derives from the practical problems which inevitably arise in attempting to both attach liability and prosecute the corporation. That there is

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<sup>137</sup> Corns, n. 17 at p. 356

<sup>138</sup> Fisse, in *Howard's Criminal Law*, (5th Ed., 1990) at p. 610



evidence in the Anglo-American jurisdictions of an increasing utilisation of ordinary homicide laws is, in the view of Maakestad, evidence of growing public intolerance where companies knowingly and recklessly endanger lives.<sup>139</sup> For all that, there is undoubted difficulty in prosecuting corporate homicide.<sup>140</sup> Field and Jorg argue that whilst enforcement has given concern one cannot ignore the form that the law takes because that shapes the way it is enforced.<sup>141</sup> Corns rather simplistically reaffirms the need to ensure that there is sustainable admissible evidence and that prosecution is in the public interest.<sup>142</sup> The problems of prosecution are however more complex than this.

Commentators identify problems much earlier on in the investigative process. Bergman, for example, offers a caricature of police involvement in workplace health and safety deaths claiming '[a]fter every death at work a police officer will come to the scene- but this is only to determine whether the deceased worker was pushed from scaffolding or into dangerous machinery by a angry workmate, in which case a formal murder inquiry would be appropriate. There is only cursory investigation to rule out foul play, and to take details of the deceased to inform relatives.'<sup>143</sup> According to Wells, it is because there are separate enforcement agencies that death are marginalised from criminal enforcement.<sup>144</sup> Bergman suggests that corporate manslaughter falls between agencies because the police excuse their continuing involvement by pointing to the HSE investigation of the incident. In turn the Health and Safety Executive are only interested in regulatory offences. This involvement of the HSE is viewed as a preliminary step in the process of decriminalisation.<sup>145</sup> Carson has argued that inspectors were originally committed to enforcing the law

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<sup>139</sup> Maakestad, n. 15 at p. 22

<sup>140</sup> Cullen et al, n. 123 at p. 319

<sup>141</sup> S. Field and N. Jorg, 'Corporate Liability And Manslaughter: Should We Be Going Dutch?' 1991 Criminal L. R. 156-171 at p. 156

<sup>142</sup> Corns, n. 17 at p. 361 et seq.

<sup>143</sup> Bergman, n. 11 at p. 18; Slapper similarly, blames, 'the mechanics of the criminal justice system' exemplified by 'the cursory investigations by the police and HSE inspectors; company directors being left uninvestigated; the willingness of coroners to facilitate proper consideration of unlawful killing verdicts; the CPS's misguided reliance on the HSE to refer suitable cases of suspected manslaughter and the HSE's image of itself as an advisory adjunct to industry.' Slapper, n. 14 at p. 435

<sup>144</sup> C. Wells, 'Manslaughter And Corporate Crime' 1989 139 New L. J. 931 at p. 932

<sup>145</sup> Bergman, n. 11 at p. 26

but that the courts ineffectual sanctioning of those prosecuted diverted the approach towards compliance rather prosecution which was to be utilised as a shock tactic.<sup>146</sup> Whilst disasters help focus attention there is a downside; resources may have to be diverted from the mainstream pro-active work of those agencies.<sup>147</sup>

In the period 1991 up to April 1994 there have been 20 prosecutions in Scotland under the HASAWA for workplace fatalities. Though there may be a greater propensity to prosecute, the level of fine is dropping. According to Woolfson et al. 'fines must be assessed in terms of the deterrence effect which they exert on a company. Only when this is done can there be any realistic notion of economic deterrence and any proper expectation of corporate compliance.'<sup>148</sup> Despite the appointment of dedicated prosecutors in Scotland there is no evidence of a more pro-active prosecutorial strategy.<sup>149</sup> Conversely, in England, Harrison detects an increased willingness (induced by high profile disasters and ensuing public outcry) on the part of the Crown Prosecution Service to prosecute for manslaughter.<sup>150</sup> More commonly where death ensues from workplace incidents, prosecutors usually invoke the provisions of the Health and Safety at Work Act 1974 rather than English, or Scottish common law. There are several recent illustrations of prosecutions under the regulatory regime of HASAWA. For example, *Guinness Brewing Worldwide Ltd* pled guilty to an offence under section 3(1) of HASAWA following the death by electrocution of subcontractors foreman. The company were fined £75,000.<sup>151</sup> The HSE also sought prosecution of *BRB and Tilbury Douglas Construction Ltd* following death of two employees when a bridge under demolition collapsed on top of them. However, there was a failure to prosecute in 1994 *Tarbsport Company* after 6 persons killed by one of their lorries at Sowerby Bridge

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<sup>146</sup> Carson, 'The Conventionalism Of The Early Factory Crime' 1979 7 International Journal of the Sociology of Law 37; See Bludgers in P. R. Wilson and J. Braithwaite, *Two Faces Of Deviance: Crimes Of The Powerful And Powerless*, (1978) at p. 180; Director-General Rington's evidence to the Cullen Inquiry asserted the HSE's belief that prohibition notices and improvement notices provided the same sort of stimuli as prosecution; Woolfson et al., n. 69 at p. 381

<sup>147</sup> Hutter and Lloyd Bostock, n. 4 at p. 421

<sup>148</sup> Bergman, n. 11 at p. 382

<sup>149</sup> Woolfson et al., n. 69 at p. 416

<sup>150</sup> K. Harrison, 'Manslaughter By Breach Of Employment Contract' 1992 21 1 Industrial L. R. 31-43 at p. 31; see *R v Morgan* [1991] Crim L R 214

<sup>151</sup> HSIB September 1994, at p. 14

in September 1993.<sup>152</sup> Unfavourable comparisons can be drawn between the treatment of individual employees and employers;<sup>153</sup> because they are the hands of the corporation, employees are particularly vulnerable to individual manslaughter prosecutions.<sup>154</sup>

### 5.5 *Mens Rea* And Corporate Homicide

It has been claimed that *mens rea* represents the embodiment of protection of the individual from criminal liability.<sup>155</sup> However, not all commentators see it as a prerequisite of a fair criminal justice system. According to Seney,

‘Another irrational objection to giving up *mens rea* claims that criminal law exists to express community moral outrage, to attach moral stigma, and thereby to further community solidarity. This is simply out of place in any reasonably enlightened society. The process of serving up scapegoats as smoking sacrificial victims to be assumed public moral bloodthirstiness hardly commends itself to civilised decision making.’<sup>156</sup>

In assessing corporate criminal liability for homicide offences one is drawn to consider the *mens rea* applicable to individuals-intent, recklessness and negligence. Intention is viewed by many as the ultimate criminal mind and often crucial in the criminality equation. Ashworth, for example, claims intention should be more defining than outcomes.<sup>157</sup> Whereas in comparison, Box argues, ‘evil should not be unrecognised merely because it is as banal as indifference; indifference rather than intent may well be the greater cause of avoidable human suffering, particularly in the case of corporate crime.’<sup>158</sup> One of the primary objections to the imputation of corporate criminal liability for homicide offences undoubtedly relates to the absence

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<sup>152</sup> HSIB, September 1994, at p. 14

<sup>153</sup> Purley train driver charged with manslaughter Cf. BRB Clapham where company was charged with a violation of the Health and Safety at Work Act.

<sup>154</sup> Harrison, n. 150 at p. 32

<sup>155</sup> S. Sethi, ‘*Liability Without Fault: The Corporate Executive As An Unwitting Criminal*’ 1978 4 Employee Relations L. J. 185 at p. 209; According to Nemerson, the connotation of *mens rea* has shifted over the years. It is now associated with blameworthiness rather than evil ‘we normally reserve the terms ‘wicked’ and ‘evil’ for individuals whose wrongful acts are believed to be a manifestation of a character trait, while ‘blameworthy’ may be applied to a person who is not believed to have such a trait.’ S. S. Nemerson, ‘*Criminal Liability Without Fault: A Philosophical Perspective*’ 1975 75 Columbia L. R. 1517-1577 at p. 1521

<sup>156</sup> Seney, n. 86 at pp. 818-9

<sup>157</sup> A. Ashworth, *Essays In Honour of J C Smith*, (1987), at p. 20; see also F. G. Jacobs, *Criminal Responsibility*, (1971), at p. 16

<sup>158</sup> S. Box, *Power, Crime And Mystification*, (London: Tavistock, 1983), at p. 21

of intent. Byam explains 'An individual's intent is usually not distinguished from his knowledge; if someone is aware of his own actions and their likely consequences, it is logical to presume his intent to engage in conduct and cause its probable effects.' Such an approach is clearly more problematic with corporations.<sup>159</sup> There are those that argue that intention is a uniquely personalised state of mind and that intention is integral to human action.<sup>160</sup> We normally presuppose that those who intend are rational agents<sup>161</sup> and that 'intention is the central or paradigm determinant of moral culpability.'<sup>162</sup> Interestingly, English law or Scots law, has never required an actual intention to kill as the sole basis upon which murder may be established.<sup>163</sup> Criminal law recognises generally, but to varying degrees, both recklessness and negligence. Intention and recklessness are advertant states of mind; negligence is arguably inadvertent.<sup>164</sup> Because negligence represents the lowest form of the criminal mind its utilisation is greeted with 'violent antipathy' believing it to be 'incompatible with the deterrent nature of criminal punishment.'<sup>165</sup> In the English case of *Doulton*<sup>166</sup> it was argued that negligent behaviour should be excluded from penal liability. The recognition of negligence as a form of criminal liability is nonetheless of some antiquity.<sup>167</sup> Jacobs explains why negligence is recognised as a form of liability defining it as, 'an acknowledgement of a moral rule requiring the exercise of due care in social relations.' In England it is suggested that there is no separate test for gross negligence.<sup>168</sup> Even if there is, Sullivan claims there are inevitable and appropriate limitations to deploying the term 'gross negligence' in relation to activities which are intrinsically lawful. His view is that 'Denunciatory notions such as 'gross negligence' can only operate fairly within

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<sup>159</sup> Byam, 'The Economic Inefficiency Of Corporate Criminal Liability' 1982 73 J. of Criminal Law and Criminology 582 at p. 584

<sup>160</sup> R. A. Duff, *Intention, Agency And Criminal Liability*, (1990) at p. 99

<sup>161</sup> Duff, n. 160 at p. 101

<sup>162</sup> Duff, n. 160 at p. 102

<sup>163</sup> Jacobs, n. 157 at p. 17

<sup>164</sup> However, Hart has argued that negligence and inadvertence are two separate concepts. In respect of inadvertence he argues that because it is a blank state of mind, no criminal responsibility should attach. Negligence on the other hand, which he describes as a departure from what a reasonable man would do in the circumstances, would be culpable. see Hart, *Punishment And Responsibility*, (New York: Oxford Univ. Press, 1968) at p. 136

<sup>165</sup> J. J. Edwards, *Mens Rea In Statutory Offences*, (1955), at p. 205

<sup>166</sup> (1889) 22 QBD 736

<sup>167</sup> Jacobs, n. 157 at p. 16

<sup>168</sup> Smith and Hogan, *Criminal Law*, (7th Ed., 1992), at pp. 353-4

the requirements of regulatory law and current patterns of accepted risks.<sup>169</sup> Nevertheless, Sullivan recognises that corporate manslaughter may have a useful residual role in providing an incentive to companies to do all that they reasonably can in preventing grossly negligent conduct on the part of officers and employees.<sup>170</sup>

In England, the *R v Kite /OLL Ltd* prosecution was successful partially because of an intervening resurrection of the law of gross negligence in England. The Court of Appeal in *R v Prentice and Others*<sup>171</sup> had suggested that gross negligence could be displayed by

‘(a) an indifference to an obvious risk of injury and health;(b) actual foresight of the risk coupled with the determination to run it;(c) an appreciation of the risk coupled with an intention to avoid it but also coupled with such a high degree of negligence in the attempted avoidance as the jury considers justifies conviction;(d) inattention or failure to advert to a serious risk which goes beyond “mere inadvertence” in respect of an obvious and important matter which the defendant’s duty demanded he should address.’<sup>172</sup>

McColgan argues that at the present time it is impossible to say whether reckless or gross negligence manslaughter are one and the same thing.<sup>173</sup> The *Prentice* case continued gross negligence as a basis of manslaughter and in the process modified what had thought to be the settled position of *Caldwell*,<sup>174</sup> but the matter has now been modified again by the House of Lords in *Adomako*<sup>175</sup> which imposes a singular test for manslaughter by gross negligence.<sup>176</sup> That test can be stated as ‘was there a breach of duty of care ?’, - ‘did the breach cause the victims death ?’ and ‘did that breach of duty amount to gross negligence ?’ Clearly, this can apply where employers have a duty to ensure safety<sup>177</sup> or where someone creates a hazardous situation.<sup>178</sup> In *Adomako*, Lord Mackay said gross negligence depended,

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<sup>169</sup> Sullivan, ‘Expressing Corporate Guilt’ 1995 15 Oxford J. of Legal Studies 281-293 at p. 289

<sup>170</sup> Sullivan, n. 169 at p. 289

<sup>171</sup> [1993] 3 WLR 927

<sup>172</sup> See Wells, n. 10 at p. 8

<sup>173</sup> McColgan, n. 79

<sup>174</sup> [1982] AC 341

<sup>175</sup> [1995] 1 AC 171

<sup>176</sup> See Ashworth, *Principles Of Criminal Law* (1995) at p. 293-5

<sup>177</sup> See Pittwood (1902) 19 TLR 37

<sup>178</sup> See Miller [1983] 2 AC 161.



‘on the seriousness of the breach of duty committed by the defendant in all the circumstances in which he was placed when it occurred and whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in the jury’s judgment to a criminal act or omission.’<sup>179</sup>

Though there is a body of opinion that contends that a corporation can exhibit intention, there is a suggestion that an altogether more fertile basis for the attribution of criminal liability to corporations for homicide crimes is the mental state of recklessness. Whilst ‘the distinction between reckless conduct and criminal negligence is often muddled’,<sup>180</sup> all the common law jurisdictions recognise recklessness as a culpable state of mind. The English Code 1989 Clause 18(c) for example states,

*‘a person acts .. ‘recklessly’ with respect to -  
(i) a circumstance when he is aware of a risk that it exists or will exist  
(ii) a result when he is aware of risk that it will occur; and it is, in the circumstances known to him, unreasonable to take that risk’*

Such an approach presupposes an -awareness of risk and that the risk taking is objectively ‘unreasonable.’ The unreasonableness depends not on just the degree of risk but on relative disvalue as compared with positive value of action which creates it. Brickey claims,

‘The line of demarcation between acceptable and unacceptable risks obviously cannot be drawn solely with reference to the degree of risk involved. It must accommodate, instead, both the utility and morality of risk taking under a given set of circumstances. Thus, to ascribe criminal culpability requires more than a finding that a risk is substantial. It must be both substantial and justified.’<sup>181</sup>

Recklessness operates in two forms- objective recklessness and subjective recklessness. Subjective recklessness is determined by individuals mind<sup>182</sup> whereas objective recklessness is based on the standard of the ‘reasonable man.’<sup>183</sup> Norrie explains that ‘recklessness..is ultimately in its very essence a matter of socio-

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<sup>179</sup> R v Adomako [1995] 1 AC 171 at p. 187

<sup>180</sup> Weinfeld, n. 115 at p. 662

<sup>181</sup> Brickey, n. 56 at p. 787

<sup>182</sup> Duff, n. 160 at p. 140-141

<sup>183</sup> See Jacobs, n. 157 at pp. 124-5; Duff, n. 160 at p. 151

political construction and judgment, not an abstract, apolitical, juridical concept of individual responsibility as maintained by both the law and the liberal political philosophy which underpins it...All the subjectivists ...are committed to a set of social values in addition to, and independent of, the perception of the reckless individual..This evaluation is a matter of objective reasonableness decided on a 'general' criteria of social utility, and does not concern the subjective perception of the individual.'<sup>184</sup> In England following the passage of the Criminal Justice Act 1967 there is no longer an objective dimension to recklessness. Scotland still has an objective element.<sup>185</sup> According to Ross, 'The recklessness required for culpable homicide is a form of criminal negligence which, although not so total in its indifference to whether the victim of the reckless behaviour lives or dies as is the case with wicked recklessness in murder, indicates by a gross want of care an indifference to the consequences of the action in its effect on the health, safety and life of the individual or of the public.'<sup>186</sup> Objectivism in criminal liability is anathema to many commentators who argue that it requires a guilty state of mind. Objective liability requires a developed reasonableness of beliefs<sup>187</sup> and it is that reference to an accepted standard rather than the accused's own state of mind which gives rise to concern. However, that concern may be misplaced; Duff argues that the question of individual psychological orientation to an offence is also a matter entailing objective consideration in the shape of the interpretative audience's perception of the accused's attitude.<sup>188</sup> Norrie rejects the Duff approach arguing that 'One can judge conduct either as it appears to the individual, or as it appears to the general standard of reasonableness. The two may coincide in individual cases, but as principled standpoints for the general evaluation of human conduct, they are in opposition to each other. Therefore, their combination in a particular area of the law presents the possibility of contradiction and incoherence within doctrine.'<sup>189</sup>

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<sup>184</sup> Norrie, 'Subjectivism, Objectivism And Criminal Recklessness' 1992 13 Oxford Journal of Legal Studies 45 at pp. 46-7

<sup>185</sup> See G. Gordon, 'The Mental Element Of Crime' 1971 16 J. of Law Society of Scotland 282-288 at p. 284; HMA v McGuiness 1937 JC 37 at p. 40; Gordon, *Criminal Law* (1968), at p. 699

<sup>186</sup> J. Ross, 'Unlawful Act Culpable Homicide: A Suitable Case For Reappraisal' 1996 Scots Law Times 75-80 at p. 79

<sup>187</sup> French, *Collective And Corporate Responsibility* (1979) at p. 155

<sup>188</sup> See Norrie op cit., n. 184 at p. 53

<sup>189</sup> Norrie, n. 184 at p. 47

Increasingly, as I have noted, negligence is being viewed as an appropriate platform on which to base corporate criminal liability.<sup>190</sup> In determining the duty incumbent on the employer guidance may be derived from the common law duty of care;<sup>191</sup> the failure to comply with certain duties could conceivably be equated with criminal negligence. In the Canadian case of *McCarthy v The King*<sup>192</sup> Duff J argued that,

‘Where the accused having brought into operation a dangerous agency which he has under his control..fails to take those precautions, which a man of ordinary humanity and reasonable competent understanding would take in the given circumstances for the purposes of avoiding or neutralising risk, his conduct in itself implies a degree of recklessness justifying the description “gross negligence”.’<sup>193</sup>

Glasbeek and Rowland advise that despite criticism, an objective test might be applicable in criminal negligence cases.<sup>194</sup> They depict a scenario where the contrast between subjectivism and objectivism might not be that great. They explain

‘Since the proponents of the necessity of a subjective intent might be using the Hart approach, while using the language of *mens rea*, they might seldom reach results which differ from those reached by the “objective test” proponents. Thus, they would be setting an objective standard first, and then deciding whether the deviation from it was sufficient to merit the attachment of criminal responsibility. If they set the objective standards as low as they would in a civil case to establish criminal responsibility, the emphasis will be on the nature of the deviation from the standard so set. A semblance of subjective intent searching will thus appear. But clearly, the “objective test” proponents may set their standard so high that, in order to find a breach of it, the court would have to find the same kind of conduct as that which constituted a gross deviation from a lower “civil” standard. The difference between the subjective intent proponents and their objective standard antagonists would, if this analysis of what they actually do is correct, be of minor significance.’

In Scots law we recognise intention and wicked recklessness for murder, and intention, wicked recklessness and criminal negligence as the basis of culpable

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<sup>190</sup> C. H. Goff and C. E. Reasons, *Corporate Crime In Canada*, (1978), at p. 121

<sup>191</sup> Glasbeek and Rowland, n. 24 at p. 544; See *Wilson and Clyde Coal v English* [1915] AC 734; *Toronto Power Co v Paskwan* [1955] 2 All ER 12 Cf. Phillips, ‘*Beyond The Limits Of Assault*’ 1995 SLT (News) 115-120

<sup>192</sup> (1921) 62 SCR 40 at p. 44

<sup>193</sup> Quoted in Glasbeek and Rowland, n. 24 at p. 548

<sup>194</sup> See Chisholm in Glasbeek and Rowland, n. 24 at p. 535

homicide. Nevertheless it is possible to frame a scheme of corporate criminal liability without reference to these existing *mens rea*. In chapter 2 a model of corporate fault was advanced which could be utilised to access the common law crimes of Scotland including the common law homicide offences. All this is not to denigrate many of the thoughtful themes brought out into play by the Anglo-American literature. It is true that many corporate homicides arise through the negligent or reckless rather than intentional acts of corporations and their agents. The question here may not just be what *mens rea* should corporations exhibit but how they exhibit it. The temptation will be that whilst we rely on derivative models of liability prosecutors will be deflected towards a zealous pursuit of the individual wrongdoer where the offence represents one of those considered at the very apex of the criminal scale. In recognising that in homicide situations the standards of behaviour of the corporation are equatable to the similarly culpable individual, we should be determined to visit our most opprobrious crimes upon them. Corporate fault perhaps offers the best route to that objective. The very conception of corporate fault implies a culpable failing in the same way that intention, recklessness, and negligence convey an unacceptable state of mind. Corporate fault is generic enough to embrace all three conceptions of the criminal mind though I concede that it may have closer approximation with negligence and recklessness than intent. In moving towards a system of corporate fault we can nonetheless retain the integrity of the values and standards we have already set for traditional homicide crimes. The instruction we may derive from jurisprudence on existing *mens rea* may well help refine our conception of what we mean by 'corporate fault.'

## **5.6 Recent Developments In Corporate Homicide In England**

Of all the common law jurisdictions, England has engendered the greatest debate about corporate homicide. Recently, The Law Commission in its report *Legislating the Criminal Code : Involuntary Manslaughter*<sup>195</sup> recommended the adoption of the offence of corporate killing. Their arguments have, in the past few weeks, been endorsed by a Government announcement of an intention to legislate to bring about

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<sup>195</sup> *Legislating The Criminal Code- Involuntary Manslaughter*, The Law Commission Report No. 237 (1996)

such an offence. However, to simply focus on this latest development would be to ignore a number of influential developments over the past twenty years or more which have contributed to the burgeoning debate on corporate homicide.

In 1970 a Working Party assisting the English Law Commission produced a working paper which contained *inter alia* several propositions relative to corporate crime. The first was that every statutory offence created should delineate that, 'the fault required is a mental intent consisting of intention, knowledge or recklessness..in respect of all the other elements of the offence, unless the requirement is expressly excluded.' Moreover, where intention knowledge or recklessness are excluded then the offence will require negligence unless it is a strict liability offence. Where there is no existing degree of fault then negligence should be required. The *cummulo* effect of these propositions is that in future all offences should require *mens rea*. It seeks to ensure that interpretation is not left to the courts and compels Parliament would require to address the issue of *mens rea* in respect of all statutory offences.<sup>196</sup> One of the reasons why the Working Party did not advocate the dispensation of intention was that it is the 'apt term to describe the element of fault in crimes in which the result is not separable from the accused's conduct.'<sup>197</sup> The Working Party adopted an approach to knowledge which determines that a person is said to have knowledge of circumstance not only when he knows they exist but also when he has no substantial doubt they exist or, he knows they probably exist.<sup>198</sup> The Working Party's definition of recklessness was that a person is reckless when 'knowing there is a risk that an event may result from his conduct or that a circumstance may exist, he takes the risk, and it is reasonable for him to take it having regard to the degree and nature of the risk which he knows to be present.' According to Gordon, this amounted to conscious negligence.<sup>199</sup> There is no requirement of gross deviation from the reasonable man for guilt to ensue.<sup>200</sup> This model might well have had application to corporation and might have provided a route through which

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<sup>196</sup> See Gordon, 'The Mental Element Of Crime', n. 185 at p. 282

<sup>197</sup> See Gordon, n. 196 at p. 285

<sup>198</sup> Gordon, n. 196 at p. 285

<sup>199</sup> Gordon, n. 196 at p. 286

<sup>200</sup> Cf. Model Penal Code



corporations could have been prosecuted in similar fashion to individuals without encountering prosecutorial reluctance to brand corporations as killers. It would however still require the issue of attribution of *mens rea* to be resolved. In any event the proposal was not proceeded with.

The Law Commission in 1994 produced a consultation paper *Legislating the Criminal Code: Involuntary Manslaughter No 135* which argued that

‘we should not ignore what appears to be a widespread feeling among the public that in cases where death has been caused by the acts or omissions of comparatively junior employees of a large organisation, such as the crew of a ferry boat owned by a leading public company, it would be wrong if the criminal law placed all the blame on those junior employees and did not fix responsibility in appropriate cases on their employers who are operating, and profiting from, the service being provided to the public.’<sup>201</sup>

This Consultation Paper also called for the abolition of unlawful act manslaughter on the basis that

‘*a fortiori*, it cannot be rational or just to use the very wide rules of unlawful act manslaughter to impose criminal liability on the corporation in whose operations a death has been caused on the basis that these operations involved an illegality of some kind or another. Such a basis for fixing serious criminal liability would be likely to have effects which would be wholly random and erratic in their nature. On the other hand, when properly handled, the rules of gross negligence can be used to elicit and apply the policy considerations which would be involved in imposing criminal liability on corporations for causing death.’<sup>202</sup>

Adherents of the Latin maxim *Versanti in re illicita imputantur omnia quae sequuntur ex delicto* (a person engaged in an illegal activity is answerable for all its consequences) would undoubtedly support the notion that where the corporation is engaged in an activity which proves to be unlawful- perhaps a contravention of a regulatory offence- and arising out of that illegal act a fatality ensues, then, that corporations should be liable under the laws of homicide for that death. Unlawful act manslaughter is recognised in several of the common law jurisdictions.<sup>203</sup> It has nonetheless proved controversial. Wells suggests that unlawful act manslaughter

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<sup>201</sup> Law Commission, n. 34 Para 4.2 at p. 89

<sup>202</sup> Law Commission, n. 34 Para 4.3 at pp. 89-90

<sup>203</sup> For full discussion see Jacobs, n. 157 at pp. 19-22

could be used in some cases.<sup>204</sup> In an earlier writing she recognises that unlawful act manslaughter encompasses a broad spectrum of non-accidental deaths.<sup>205</sup> In England the decision of *R v Dalby*<sup>206</sup> argues that for unlawful act manslaughter to occur the act must be directed at the victim. Unlawful act manslaughter, according to the Law Commission 'is founded not on the supportable principle or policy but has survived from the insupportable doctrine of constructive liability, whereby liability for a serious crime is constructed out of liability for a lesser crime.'<sup>207</sup> In Scotland, this approach was not ruled out by *Lord Advocates Reference (No1 of 1994)*.<sup>208</sup> Ross has however called for the abolition of the unlawful act culpable homicide in Scotland. In her view,

'The concept of recklessness which combines a description of behaviour and an inference of a mental element from that behaviour (indifference to consequences) is surely sufficient to identify those homicides which should be subject to criminal penalty.'<sup>209</sup>

At the time the Law Commission took the view that the imposition of liability for inadvertent killing was neither truly 'erratic or capricious.'<sup>210</sup> That view had been substantially formulated in the wake of several high profile disasters.<sup>211</sup> The Commission's position was a departure from the decision in *Cunningham*.<sup>212</sup> *Cunningham* sets out that an intention to cause really serious injury is sufficient for murder without any proof that that the defendant intended, or even contemplated, the possibility that death would result.<sup>213</sup> The Law Commission had argued for two types of manslaughter; one based on subjective recklessness as to whether death or serious injury would ensue<sup>214</sup> and the other based on inadvertent risk taking. The latter was to be founded on gross negligence. Liability would arise where the accused 'ought to have been aware of as significant risk that his conduct would

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<sup>204</sup> Wells in Lacey et al., *Reconstructing Criminal Law* (1990), at p. 243

<sup>205</sup> Wells, n. 21 at p. 789

<sup>206</sup> [1982] 1 All ER 916

<sup>207</sup> Law Commission, n. 34 para 5.4 at p. 109

<sup>208</sup> 1995 SLT 248

<sup>209</sup> Ross, n. 186 at pp. 79-80

<sup>210</sup> Law Commission, n. 34 at Para 1.20

<sup>211</sup> McColgan, n. 79 at p. 549

<sup>212</sup> [1982] AC 566; See McColgan, n. 79 at p. 549

<sup>213</sup> Ashworth, op cit. n. 176 at p. 260

<sup>214</sup> Law Commission, n. 34 paras 5.16-5.21

result in death or serious injury' and where his 'conduct fell seriously and significantly below what could reasonably have been demanded of him in preventing that risk from occurring or in preventing the risk, once in being, from resulting in the prohibited harm.'<sup>215</sup> McColgan notes the Law Commission's recognition that the objective recklessness in their proposals is not enough to bring corporations under its ambit particularly given the problems of corporate *mens rea*.<sup>216</sup> According to McColgan,

'The culpability of corporations would be established according to whether the corporation should have been aware of the significant risk that its conduct would have resulted in death or serious injury, and whether the corporations conduct fell seriously and substantially below what could reasonably have been demanded of it in dealing with that risk.'<sup>217</sup>

The Commission recognised that liability would not simply ensue from the fact that the corporation had engaged in an operation which gives rise to risk but rather determination would be had by recourse to its decision making structures. According to the Law Commission,

'The question...simply is whether those responsible for taking decisions should have been (not actually were) aware of a significant risk that these operations, either at their commencement or during their continued pursuit, could result in death or serious injury...Once there is evidence that employees have perceived a risk, even a small one, of serious consequence, it will then be appropriate to look critically at the company's system for transmitting that knowledge to the appropriate level of management, and for acting on the knowledge received...reference to the company's organisation, attitude and concern for safety in general will be relevant.'<sup>218</sup>

McColgan contends that the Law Commission's proposal on subjective recklessness 'is to be welcomed as striking a balance between the evils of constructive liability and the social protection arguments in favour of penalising those who take risks which result in other people's deaths'<sup>219</sup> whereas the Law Commission concept of manslaughter by inadvertent risk taking would 'By virtue of its separation from subjectively reckless manslaughter...allow differential sentencing regimes to operate

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<sup>215</sup> Law Commission, n. 34 para 5.57

<sup>216</sup> McColgan, n. 79 at p. 530

<sup>217</sup> Law Commission, n. 34 para 5.85

<sup>218</sup> Law Commission, n. 34 para 5.80-5.83 quoted in McColgan, n. 79 at p. 550

<sup>219</sup> McColgan, n. 79 at p. 552

in respect of cases where the defendant deliberately took risks and where he or she did so unwittingly.’ The Commission insisted that its proposed law of corporate manslaughter had to ‘work within the present system.’<sup>220</sup> McColgan concludes that the refusal by the Law Commission,

‘to consider the possibility that different approaches might properly be applied in respect of individual and corporate manslaughter liability results in its across-the-board espousal of the objective test. Its application of that test in the corporate context should render the imposition of liability for manslaughter easier than it is at present. Nevertheless, the Commission’s failure to extend consideration to corporate liability in general, rather than solely in the context of manslaughter, is to be regretted.’<sup>221</sup>

In summary, the Law Commission’s Consultation Paper argues that manslaughter should be confined to situations where accused consciously risks death or injury.<sup>222</sup> They argued for the creation of a unified approach to manslaughter and envisage that corporations will be subject to that unified law. One possibility canvassed by Law Commission was a new offence of ‘causing death.’<sup>223</sup> The Law Commission also argued for the retention of subjective reckless manslaughter where the accused was aware of the risk that death or serious injury would occur, and unreasonably took that risk.<sup>224</sup> Their general law of manslaughter determines that there should be a significant risk of death or personal injury. There is no need for the risk to be obvious; the jury will determine this objectively.<sup>225</sup> They suggest that the accused ought reasonably to have been aware of the significant risk that his conduct could result in death or his conduct fell seriously and significantly below what could reasonably have been expected in preventing that risk. In applying the law of manslaughter the question will be whether the corporation should have been aware of the significant risk that his death could result in death or serious injury. Liability

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<sup>220</sup> Law Commission, n. 34 para 5.91

<sup>221</sup> McColgan, n. 79 at p. 556

<sup>222</sup> Law Commission, n. 34 para 5.43

<sup>223</sup> Law Commission, n. 34 para 5.18-5.21; see Criminal Law Bill in Law Com No 218 ‘A person is guilty of an offence if he causes the death of another intending to cause injury to another or being reckless as to whether injury is caused.’

<sup>224</sup> Law Commission, n. 34 para 5.21 *op cit.*

<sup>225</sup> Law Commission, n. 34 para 5.54

will only arise when a corporation chooses to operate a particular enterprise with inherent dangers.

The Law Commission's Report *Legislating the Criminal Code; Involuntary Manslaughter*, in a *volte face* from the earlier proposals contained in the Consultation Paper, suggested a new offence of corporate killing which was nevertheless modelled on the original proposal.<sup>226</sup> The Report proposes three offences to replace manslaughter including a separate offence of corporate killing where (a) management failure by the corporation is the cause or one of the causes of a person's death; and (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.<sup>227</sup> There is management failure by the company if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or so affected by those activities.<sup>228</sup> There are also two offences suggested of reckless killing and killing by gross carelessness. For both these offences the identification route would be retained. In respect of the offence of killing by gross carelessness there would be three elements. First, the defendant would have had to have caused the death of the victim. Second, the defendant ought to have been reasonably aware of significant risk that their conduct could result in death or serious injury. Third, their conduct fell seriously below what could have reasonably been demanded from him.<sup>229</sup> Individuals will be liable as secondary parties to corporate killing whilst corporations will be liable for all three offences. There is a suggestion that the prosecutorial approach might be deflected to simply pursuing a charge of corporate killing. Wells expresses concern that the new proposals through the vague concept of 'managerial failure' will allow prosecutors to target individual directors rather than the corporation itself.<sup>230</sup> The Law Commission itself was concerned that it should not develop proposals which essentially resulted in strict liability for

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<sup>226</sup> Dunford and Ridley, n. 5 at p. 11

<sup>227</sup> See Wells 'Corporate Killing' 1997 New Law Journal 1467-1468

<sup>228</sup> Clause 4(2) (a)

<sup>229</sup> Ridley and Dunford 'Corporate Killing- Legislating For Unlawful Death' 1997 vol. 26 No 2 Industrial Law Journal 99-113 at p. 108

<sup>230</sup> Wells, n. 227 at p. 1468



corporations.<sup>231</sup> By the same token they also sought to develop a formulation which did not involve the identification theory.<sup>232</sup> Their eventual formulation of 'managerial failure' as the test of corporate fault ensure that the factors considered are managerial and organisational rather than purely operational. By so doing it 'reinvigorates the hierarchy' in a similar fashion to *Natrass*.<sup>233</sup> Despite the novelty of 'managerial failure', Ridley and Dunford still believe that assessment of the corporations conduct will be analogous to the assessment of recklessness in that it will be necessary to show that the corporation's conduct fell far below what could reasonably be expected balancing an equation involving harm, utility and the cost of prevention.<sup>234</sup> The real change is that the requirement that the risk of death or serious injury would have been obvious to a reasonable person in the accused's position is removed. It will still be necessary to show that the defendant's conduct fell far below what could reasonably have been expected in the circumstances. The jury on the balance of likelihood of harm, the utility of conduct and the cost of precautions which would have eliminated the risk of death or serious injury, will determine this issue.<sup>235</sup> One fear is that juries will have unrealistic expectations as to what systems and protections should have been in place.<sup>236</sup> The Law Commission also suggest an adaptation of the law of causation for corporations. What needs to be examined is the kind of conduct rather than the status of the person responsible for it.<sup>237</sup> Here the common law of health and safety may be instructive. Individuals may continue to be liable within corporations found guilty of corporate killing.<sup>238</sup> Causation would be established on the basis that 'the death would not otherwise have occurred if it had not been for the management failure. If the management failure consists of a failure to ensure that some potentially dangerous operation was properly supervised, a jury would be unlikely to conclude that this failure caused the death if the immediate cause was the deliberate act by an employee rather than a

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<sup>231</sup> Mackay 'Corporate Liability For The Health And Safety Of Others' 1996 146 New Law Journal 441

<sup>232</sup> See Ridley and Dunford, n. 229 at p. 109; Meridian Global [1995] 3 All ER 910 at p. 923; Law Commission Report No 237, n. 195 para 8.3

<sup>233</sup> Ridley and Dunford, n. 229 at p. 110

<sup>234</sup> Ridley and Dunford, n. 229 at p. 109

<sup>235</sup> Dunford and Ridley, n. 5 at p. 12

<sup>236</sup> Dunford and Ridley, n. 5 at p. 12

<sup>237</sup> Dunford and Ridley, n. 5 at p. 12

<sup>238</sup> See Dunford and Ridley, n. 5 at p. 13

merely careless one- even if that act would probably not have occurred had a supervisor been present.’ The Commission claims that the company will not be able to rely on the fact that the immediate cause of the accident was the negligence of the employee. The company’s failure will lie in the failure to anticipate the foreseeable negligence of its employee, and the consequence of that is the company’s fault.<sup>239</sup> The original 1994 proposals recommended retention of the fine as a sanction. In the 1996 proposal, the suggestion is that the court will have power to order remedial action to ‘remedy any matter which appears to the court to have resulted from the failure and been the cause of death.’<sup>240</sup> The prosecution will require to be proactive in seeking such an order.

As volatile as the debate in England has been, it does nonetheless illustrate a willingness to explore possibilities. Some of those possibilities are generic reforms of homicide laws which incidentally have ramifications for corporate homicide. Others are specifically geared towards developing a new offence of corporate killing outside the confines of general homicide laws. With the new Government announcing in the last few days of their intention to legislate for a new offence of corporate killing it now seems clear that the latter proposition has prevailed in England, and that some time soon there will be a bifurcation of approach. Those who had hoped that by modifying the law of homicide generally that they might find the right formulation to apply the law equally to individuals and corporations, have in the process been disappointed. In Scotland there has been no such debate and no such assessment of the best way forward. The application of any new offence can only serve to block any attempt to use ordinary criminal laws to deal with corporate homicide. It seems inconceivable that prosecutors will look at traditional homicide laws if they have a tailored alternative. For that reason, the proposals for a new offence of corporate killing may not be the panacea its supporters hope.

## **5.7 Some Problems Of Corporate Liability Under Homicide Laws**

### **Liability Attribution**

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<sup>239</sup> Dunford and Ridley op cit., n. 5 at p. 13

<sup>240</sup> Dunford and Ridley, n. 5 at p. 14

The identification doctrine applicable in corporate crimes in the United Kingdom presents special problems in respect of corporate homicide.<sup>241</sup> Following the decision in *R v Coroner for Kent and Sussex ex p Spooner (supra)*, it became apparent that 'deficiencies of corporate organisation themselves prevent any individual "controlling officer" from having sufficient information to be personally liable, conviction of the corporation is not possible.'<sup>242</sup> Identification, as a method of attribution, appears too restrictive as a method of applying manslaughter to the corporation.<sup>243</sup> The current willingness to utilise more conventional crime classification necessitates a review of how best to make corporations criminally accountable.<sup>244</sup> Corns suggests that 'In the context of a homicide prosecution, there is a strong argument that as a matter of social policy, a narrow class of individuals, representing the company, should be construed. The negligent conduct of any employee would not suffice: the relevant individual should be in a position to determine high corporate policy and possess autonomy of decision making.'<sup>245</sup> Corns' suggestion represents a *cul de sac* in legal thinking. One supposes, without direct evidence, that his thinking is that because homicide prosecution represents the pinnacle of seriousness in law enforcement, that it should only be entertained in the most narrow of circumstances. One can support that line of thinking without accepting restriction based on particular personnel; this is simply the poverty of identification revisited. As a radical alternative, Australian commentators have argued that the search for the criminal mind in such cases is unnecessary. Brown et al have argued that,

'if manslaughter by criminal negligence rests on an objective standard, why is the search for the mind and will of the company relevant? Why should we not conclude in particular circumstances, for example, that in failing to set up effective channels of communication to ensure that senior management does become aware of knowledge spread throughout the company, a particular company has fallen considerably short of the standard which a reasonable company would have exercised, in circumstances where the reasonable company would have realised the probability that serious harm would result?'<sup>246</sup>

<sup>241</sup> Dunford and Ridley, n. 5 at p. 16

<sup>242</sup> McColgan, n. 79 at p. 548

<sup>243</sup> C. Wells, *Corporations And Criminal Responsibility*, (1993) at pp. 131-2

<sup>244</sup> Wells, n. 144 at p. 934

<sup>245</sup> Corns, n. 17 at p. 360

<sup>246</sup> Brown et al. at p. 600 quoted in Corns, n. 17 at p. 360

In these few comments we begin to appreciate the case in favour of corporate fault. If intention in the human actor can be deduced from the quality of his or her actions why can the same not be so for the corporation. The outline model I seek to develop in chapter 6 rejects the notion of liability of traditional *mens rea* located through identification of one or more human agents operating within the body corporate. Irrespective of whether the common law homicide crimes are retained or a new offence of corporate killing is introduced corporate fault should be the preferred basis of liability.

### **Liability For Omission/Commission In Corporate Homicides**

A further complexity in the vexed question of corporate liability for homicide is whether there should only be liability for acts of commission or, whether it should be extended to acts of omission. The jurisprudence betrays a general reluctance to impose liability for omissions<sup>247</sup> on the basis that '*ex hypothesi* the defendant does nothing, the evil result would necessarily occur in precisely the same way if, at the moment of the alleged omission, he did not exist.'<sup>248</sup> Gross claims there is no such thing as liability of pure omission.<sup>249</sup> However, Braithwaite argues, 'While the law is generally reluctant to impose criminal liability for knowing of a crime and failing to prevent it, this principle should not be carried over to the context of the corporation. When the Chief Executive officer knows of (or is wilfully blind to) a crime and fails to stop it, s/he lends his or her authority tacitly to approve the crime. Command differs from authorisation only in terms of which party- the superior or the subordinate-initiates the crime.'<sup>250</sup> According to Hughes, the criminal law has never been exclusively prohibitive and that there may in certain circumstances be a duty to act.<sup>251</sup> The duty to act may arise from a relationship,<sup>252</sup> based on contract<sup>253</sup> or be based on the creation of the peril.<sup>254</sup> It has also been suggested in another

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<sup>247</sup> J. C. Smith, '*Liability For Omissions In The Criminal Law*' 1984 4 Legal Studies 88-101 at p. 88

<sup>248</sup> Smith, n. 247 at p. 88

<sup>249</sup> Gross, *A Theory Of Criminal Justice* (1979), at p. 62

<sup>250</sup> Braithwaite, *Corporate Crime In The Pharmaceutical Industry*, (1984), at p. 323

<sup>251</sup> G. Hughes, '*Criminal Omissions*' 1958 67 Yale L. J. 590-637 at p. 590

<sup>252</sup> Robinson, '*Criminal Liability For Omissions: A Brief Summary And Critique Of The Law In The USA*' 1982 29 New York Law School L. R. 101

<sup>253</sup> Robinson, n. 252 at p. 115

<sup>254</sup> Robinson, n. 252 at p. 116

major jurisprudential contribution on the subject that acquiescence may be tantamount to silent authorisation since the employee can reasonably construe his superiors silence as encouragement to continue his unlawful acts.<sup>255</sup> In English law there is reluctant recognition of criminal liability for omissions.<sup>256</sup> In the *Miller* case it appears the House of Lords determined that the defendant came under the duty recognised by the criminal law only when he was aware of what he had done and, of the consequences of what he had done. Smith suggests that as a general principle

‘whenever the defendant’s act, though without his knowledge, imperils the person, liberty or property of another, or any other interest protected by the criminal law, and the defendant becomes aware of the events creating the peril, he has a duty to take reasonable steps to prevent the resulting peril from resulting in the harm in question. He will, however, be guilty of a crime only if two further conditions are satisfied. The first is the existence of an offence which is capable of being committed by omission. In the case of statutory offences, this will depend on the precise wording of the definition. The second condition is that the defendant must have omitted to act with the fault required for the particular crime.’<sup>257</sup>

Smith also suggests that no question of omission arises because the *mens rea* is deemed to have been formed during the course of the act.<sup>258</sup> One difficulty is that,

‘in an offense of commission, the mind of the actor is almost always to some extent addressed to the prohibited conduct even though he may be unaware of the legal prohibition. In these offenses, *mens rea* can quite usefully be generalized as an intention to bring about the prohibited consequences or, at least recklessness with regard to the consequences. With omissions the great difficulty is that the mind may not be addressed at all to the enjoined conduct, if he is unaware of the duty to act.’<sup>259</sup>

According to Hughes, conventional attitudes to *mens rea* impede the development of jurisprudence on omissions. In his opinion reformation of the law of omissions is long overdue.<sup>260</sup>

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<sup>255</sup> ‘Developments In The Law. Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions’ 1979 Harvard Law Review 1229-1375 at p. 1266 op cit.

<sup>256</sup> Smith (1869) 11 Cox CC 210; Pitwood (1902) 19 TLR 37; Miller [1982] 2 All ER 386 HL

<sup>257</sup> Smith, n. 247 at p. 95

<sup>258</sup> Smith, n. 247 at p. 100

<sup>259</sup> Hughes, n. 251 at pp. 600-1

<sup>260</sup> Hughes, n. 251 at p. 636



Any offence defined in terms of an omission invariably carries with it a duty to act.<sup>261</sup> However, offences defined in terms of affirmative conduct may nonetheless be completed where there is an omission. In Scotland, murder and culpable homicide are but two examples where one can substitute the failure to perform a legal duty (not a moral one) for the affirmative *actus reus*. In America, the Model Penal Code asserts that liability for omission unaccompanied by action cannot exist unless there is a duty to act.<sup>262</sup> In respect of omissions a further problem of causation will be encountered. The Model Penal Code states causation occurs where

- (1) *the conduct is an antecedent but for which the result in question would not have occurred and*
- (2) *the result is not too remote or accidental in its occurrence to have a just bearing on the actor's liability or on the gravity of the offense.*<sup>263</sup>

Robinson's alternative proposal is that

'A person is not guilty of an offense upon omission to perform an act (1) if he is physically incapable or otherwise could not reasonably be expected under the circumstances, to perform the act, (2) if his failure to act is not of his effort or determination, or (3) if he would be denied a justification defense to criminal liability resulting from the act he failed to perform.'<sup>264</sup>

Glasbeek and Rowland argue that the distinction between commission and omission is unattractive; they are essentially two sides of the same coin.<sup>265</sup> The imposition of a specific duty might assist the prosecution in establishing guilt but it is likely that the mental state of the accused will be the more problematic hurdle. The Canadian Law Commission encapsulate the problem in arguing that 'It seems reasonable, in our view, that if criminal responsibility is to be placed on corporations, the harm resulting from the action or inaction on the part of the people within the corporation should be related to the policies that are adopted by the corporation to achieve its objectives, the practices that may become accepted within the corporation, or the failure by corporate policy-makers to take steps to prevent its occurrence.'<sup>266</sup> On the face of things, corporations can legitimately be liable for omissions where the law

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<sup>261</sup> See Robinson, n. 252 at p. 103

<sup>262</sup> MPC 2.01(3) (b)

<sup>263</sup> Robinson, n. 252 at p. 107; Model Penal Code 2.03

<sup>264</sup> Robinson, n. 252 at pp. 123-40

<sup>265</sup> Glasbeek and Rowland, n. 24 at p. 540

<sup>266</sup> Canadian Law Reform, Criminal Action at pp. 20 quoted in Goff and Reasons, n. 192 at p. 122

currently so provides. There is no need to extend the law to make any special accommodations. In accepting that position, we must accept the slightly unsatisfactory position in Scotland that liability will only ensue where but for the omission events may have taken a different course. As Gordon explains 'recourse to "but for" causation is not very satisfactory.'<sup>267</sup>

### **The Issue Of Resultant Harm And Endangerment**

In most criminal law systems there is a full scale application of the maxim *primum non nocere*- (the main thing is not harm). Harm is a predominant issues affecting both liability and punishment. Whilst it is true that not all harm is crime,<sup>268</sup> it is supposed that there are two dimensions to legal, and moral, guilt- seriousness of harm and the agent's responsibility for the relevant harm. However, to attach criminal liability on the basis of infliction of harm is also problematic. Harm may ensue from mere chance rather than culpable design. Many commentators are critical of liability based on mere chance. According to Ashworth, 'it is more justifiable to criminalise a negligent attempt if the potential danger is to life and limb, possibly of many people, whereas there may be little or no social justification for penalising reckless attempts to violate less central interests.'<sup>269</sup> In respect of harm there is a consequentialist and non-consequentialist positioning of commentators. Consequentialists view rightness, or wrongness, of actions as depending solely on the goodness or badness of consequences;<sup>270</sup> non-consequentialists find intrinsic significance in the intended action.<sup>271</sup> In resolving the dilemma of criminalising negligent or reckless conduct without harm perhaps a compromise can be reached by focusing purely on offences against the person.<sup>272</sup> Ashworth concedes that resultant harm still dominates the law of manslaughter.<sup>273</sup> Contesting the current position, Katz has claimed that 'In the criminal law 'dangerousness' should operate as a fundamental criterion in the formulation,

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<sup>267</sup> Gordon, *Criminal Law* (2nd Ed) n. 185 at p. 128

<sup>268</sup> See Paehlke in F. Pearce and L. Snider (Eds.), *Corporate Crime: Contemporary Debates*, (1995)

<sup>269</sup> Ashworth, n. 157 p. 18

<sup>270</sup> Duff, n. 160 at p. 105

<sup>271</sup> Duff, n. 160 at p. 111

<sup>272</sup> Ashworth, n. 157 at p. 19

<sup>273</sup> A. Ashworth, n. 176 at p. 295

application and execution of legal norms.<sup>274</sup> Recognising that 'almost all men and women are potentially dangerous under certain circumstances' should not occasion concern for those who wish to penalise the creation of danger.<sup>275</sup> Despite the importance of harm, there is a suggestion by Seney that 'In practice we have scrupulously avoided including "harm" in the definition of particular crimes. With the partial exception of murder, our substantive criminal law consistently prohibits specified conduct rather than specific harm.'<sup>276</sup>

Ashworth notes the harm plus culpability paradigm of criminal liability. Robinson however suggests a more expansive threefold approach underpinning criminal law-harm, unlawfulness and culpability.<sup>277</sup> Where harm is thought sufficiently dangerous perhaps the proper role is for the regulatory/enforcement intervention before the harm is caused.<sup>278</sup> Ashworth expresses concern about the law abounding with inchoate offences which penalise not the actual doing of harm but doing an act with the intent to do harm or even acts likely to cause a particular harm.<sup>279</sup> However, acts preliminary which manifest a clear intention to inflict harm should be punished. It is true that in addressing harm the criminal law considers threatened harm as well as actual harm, and in respect of incomplete or unsuccessful crimes the law responds with the creation of a number of inchoate crimes and the punishment of preparatory offences.<sup>280</sup> The inchoate mode is characterised by a style of defining criminal offences which proscribes the doing of certain acts in order to produce a certain outcome.<sup>281</sup> One advantage of defining an offence in inchoate mode is that it provides for offences of negligent or reckless conduct. Smith expressed himself in favour of 'result-orientated definitions as a normal mode of definition, arguing that the wider adoption of a mode of definition which did not incorporate the results of conduct would have the demerit of extending the criminal law without yielding any

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<sup>274</sup> Katz, 'Theoretical Reconstruction Of The Criminal Law' 1970 19 Buffalo L. R. 1, at p. 3

<sup>275</sup> Heller, 'Dangerousness, Diagnosis And Disposition' 1969 46 FRD 577 at p. 599

<sup>276</sup> Seney, 'A Pond As Deep As Hell - Harm, Danger And Dangerousness In Our Criminal Law' 1971 17 Wayne L. R. 1095-1143 at p. 1109

<sup>277</sup> Robinson, n. 252 at p. 266

<sup>278</sup> Ashworth, 'Criminal Attempts And The Role Of Resultant Harm Under The Code And In Common Law', 1988 19 Rutgers Law Journal at p. 727

<sup>279</sup> Ashworth, n. 278 at pp. 727-8

<sup>280</sup> K. J. M. Smith, 'Liability For Endangerment' 1983 Criminal L. R. 127-136 at p. 127

<sup>281</sup> Ashworth, n. 157 at p. 8

significant benefit in terms of general deterrence.<sup>282</sup> Nonetheless, there are clear difficulties in reconciling desert retributivism with incomplete harm attempts.<sup>283</sup> If there is less than purposive intention there is no general inchoate crime. The laws 'approach is contextual in the sense that liability is created for particular cases where a person (advertently or otherwise) generates the risk of criminal harm occurring. If the prevention of harm is the true objective why has there been no assessment of a general endangerment as an offence in UK ?'<sup>284</sup> One reason offered for the failure to create an endangerment offence is,

'the practical demonstration of the need for and value of a more general prohibition of unjustifiable risk taking is inherently problematic. The difficulty lies in the very limited visibility of the 'endangerment' involved, it being often transient and either unwitnessed or lacking residual probative evidence. It is frequently only anticipatory observation or inspection of particularly intrinsically hazardous activities..by designated bodies..that produces the evidence of endangerment which would otherwise probably continue until actual harm materialises.'<sup>285</sup>

There is a suggestion that an endangerment offence should be limited to concurrence with a violation of a regulatory statute.<sup>286</sup> The calls for an endangerment offence are designed to move us away from a harm-based system. Given that the modern thrust of criminal law has been towards prevention, an endangerment offence may rest easier with that strategy and, with what has been described as our move towards a more systems based approach. The idea behind endangerment rather than resultant harm is that that corporations should not benefit from the fortuity of consequence. If they create unnecessary risks they should be prosecuted for endangering life rather than waiting for the law to 'kick in' once a fatality ensues. It is an argument with powerful force. Ashworth argues that there is scope for an increase in risk-creation crimes with consequent due diligence defences to illustrate risk avoidance. This

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<sup>282</sup> Ashworth, n. 157 at p. 7

<sup>283</sup> Ashworth, n. 278 at p. 735

<sup>284</sup> There is an endangerment offence contained in Section 1617 of the 1979 Senate Federal Criminal Code reform Act would punish a person where

*'he engages in conduct that he knows places another person in imminent danger of death or bodily injury, and (1) his conduct in the circumstances manifests an extreme indifference to human life, or (2) his conduct in the circumstances manifests an unjustified disregard for human life.'* see Smith, n. 280 at p. 129; Gordon n. 267 at pp. 866-7

<sup>285</sup> Smith, n. 280 at p. 135

<sup>286</sup> Spurgeon and Fagan, n. 23 at p. 432

notion is rooted in the belief that 'prevention of future harm is of greater social importance than any abstract notion of 'justice' based on past events.' The aim according to Ashworth should be to ensure that corporations are punished proportionate to their culpability rather than simply the consequences of their crimes.<sup>287</sup> In supporting the rationale for a general endangerment offence it is perhaps worth noting that we have the rudiments of one already.

Health and safety laws are often criticised as vague and exhortatory.<sup>288</sup> Moreover, 'safety laws tend to be regarded in the academy and amongst the judiciary as a typical and somewhat separate from "real" criminal laws.'<sup>289</sup> For all that, there is the basis of an endangerment offence in the Health and Safety at Work Act 1974. The Robens Report recommended that 'special attention must be given to the need to protect the public as well as workers, from the large scale hazards which sometimes accompany modern industrial operations.'<sup>290</sup> In response to this section 3(1) was enacted in the HASAWA which sought to regulate the exposure to risks. The concept of 'exposure to risk' was considered in *R v Board of Trustees of the Science Museum*.<sup>291</sup> The prosecution had argued that the mere existence of risk was sufficient to sustain the offence and that it was not necessary to show that the victim suffered harmful exposure (in this case to Legionnaire's bacterium). The judge directed the jury that 'risk' meant possible source of danger. The case of *R v Associated Octel Co. Ltd* defines what is to be considered the employer's undertaking. The Court of Appeal rejected the idea that control played any part in determining what's was one's undertaking<sup>292</sup> though it might be relevant in the context of reasonable practicability. In the contest of the statute undertaking meant business or enterprise. The engagement of an independent contractor might lead to an employer escaping liability on the basis that he had no control and that it was reasonably practicable to rely on the contractor's expertise. Whilst that might be a

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<sup>287</sup> Ashworth, n. 176 at p. 118

<sup>288</sup> Wells, n 10 at p. 6

<sup>289</sup> Wells, n. 10 at p. 3; James, 'Reforming British Health And Safety Law: A Framework For Discussion' 1992 21 Industrial Law Society 83-103 at p. 86

<sup>290</sup> Report of Committee on Safety and Health at Work (1972) Cmnd 5034, para 194

<sup>291</sup> [1993] 3 All ER 853

<sup>292</sup> Rejecting dicta in *RMC Roadstone Products Limited v Jester* [1994] 4 All ER 1037



reasonably practical step especially for a small organisation, following *Associated Octel* there can be no question of it being considered 'outwith the employer's undertaking'.<sup>293</sup> In *R v British Steel PLC*<sup>294</sup> the defendant company sought to argue that they satisfied the reasonably practicable requirement by delegating from the controlling mind to a competent employee engineer. The engineer in question was supervising the movement of part of a large steel platform. The labour for the task was provided by a subcontractor. Against the instructions of the engineer the subcontractors cut the supports and the platform collapsed killing one of the men. The Court of Appeal held that the *Natrass* doctrine was not available in Health and safety cases; to allow it to be so would drive a 'juggernaut through the legislative scheme.' Controlling minds could not delegate supervision, not even in a large organisation. According to Dunford and Ridley, the *British Steel* case highlights one of the weaknesses at the heart of the regulatory framework: the adversarial criminal procedure, linked as it is with punishment on conviction, encourages a combative approach to resisting prosecution, which is at odds with the conciliatory methods preferred by the HSE.<sup>295</sup> Following *Octel* and *British Steel* the defence of reasonable practicability in relation to section 3 appears 'only available where it is established that there is no assumption of control by the organisation of the work carried out and where the organisation is able to prove, on the balance of probabilities, that it would not have been reasonably practicable for the employer to do other than rely on the expertise of the independent contractor'.<sup>296</sup> Mackay highlights the inconsistency in allowing delegation of supervision to independent contractors but not employee's and in the process argues that the offence is now one of strict liability.<sup>297</sup> Section 3 of HASAWA *prima facie* seems more cognisant of risk rather than proven harm,<sup>298</sup> and in that sense is an extremely useful offence. In calling for the utilisation of homicide laws in respect of corporate killings, it is

<sup>293</sup> See Mackay, n. 231 at p. 440

<sup>294</sup> (1995) Crim L R 654

<sup>295</sup> Dunford and Ridley, n. 5 at p. 9

<sup>296</sup> Mackay, n. 231 at p. 440

<sup>297</sup> Mackay, n. 231 at p. 440

<sup>298</sup> See Blaikie, 'Health And Safety At Work: Workplace Risks And Public Safety' 1997 Scottish Law and Practice Quarterly 155-161 at p. 159

important to recognise that our over-riding concern must be to stop such fatalities arising in the first place.

### 5.8 Corporate Homicide And Health And Safety Regulation

One of the principal reasons advocated by proponents of using homicide laws against corporations for so doing, is the failure of the existing regulatory regime. However as Lacey et al. note that 'it is not always easy to say which comes first- the reluctance to use criminal law which leads to specific regulation, or the existence of specific regulation which diverts attention from the possibility of prosecution for offences such as manslaughter, murder or assault.'<sup>299</sup> De Vos contends that there must be serious question about regulations' authenticity and effectiveness.<sup>300</sup> According to him, it is likely that, 'both academic scrutiny and legal regulation of socially costly corporate behaviour is probably going to remain sporadic and of rather limited effect for some time to come..Waves of commitment to regulation will come and go.'<sup>301</sup> Somewhat ironically, there is a conflicting pressure within society to reduce and increase regulation.<sup>302</sup> Certainly, the statistics make interesting reading. In 1995 the conviction rate fell to 1490 from 1507; the average fine was £2,447 excluding exceptional fines and the number of inspectors fell from 1572.5 to 1470.<sup>303</sup> In only 35% of health and safety cases are prosecutions brought.<sup>304</sup> Furthermore, in 1985/6 only 10% of inspectors' time was devoted to accident investigation.<sup>305</sup> Clearly there is both a legal reason and a symbolic reason for accident investigation. In respect of the latter the inspectorate displays its activity and that the matter is taken seriously. Moreover, investigation creates enforcement opportunities.<sup>306</sup> However, it would appear that prosecution is the exception rather

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<sup>299</sup> Lacey et al., n. 204

<sup>300</sup> De Vos in Fisse and French (Eds.), *Corrigible Corporations And Unruly Law*, (1985), at p. 85

<sup>301</sup> De Vos in Fisse and French (Eds.), n. 300 at p. 89 cf. Brown and Rankin 'Persuasion, Penalties And Prosecution: Administrative v Criminal Sanctions' in Freidland *Securing Compliance* (Univ. of Toronto Press, 1990)

<sup>302</sup> Hutter and Manning, 'The Context Of Regulation: The Impact Upon Health And Safety Inspectorates In Britain' 1990 vol. 12 no. 2 Law and Policy 103-136 at p. 104

<sup>303</sup> See Annual Report of HSC (1995); see Tombs, 'Industrial Injuries In British Manufacturing Industry' 1990 38 Sociological R. 324 at pp. 331-2

<sup>304</sup> Wells, n. 10 at p. 3

<sup>305</sup> Hutter and Lloyd Bostock, n. 4 at p. 412; see Tombs, n. 303 at p. 334

<sup>306</sup> Hutter and Lloyd-Bostock, n. 4 at p. 417

than the norm.<sup>307</sup> Approximately 1% of investigations lead to prosecution, though prosecution is more likely following an accident than at any other time.<sup>308</sup> Notwithstanding the difficulties and pressures faced by enforcement authorities, many are critical of the attitude and approach of regulators to corporate crime. Glasbeek, for example, asserts that it is a,

‘fact that policing of regulatory statutes is lax. The politicians do not provide sufficient funding; inspectors are amiable conciliators more than they are purposeful enforcers; the standards to be enforced are set with too much regard for alleged economic efficiency; the administrative agencies have no clear-cut policies, not knowing whether they should promote capital accumulation..or to legitimate political liberalism by showing that they are not willing to trade olives for property.’<sup>309</sup>

Carson offers support for the approach of regulators claiming that ‘belief in the efficacy of maintaining consistent pressure upon employers has been endemic in the inspectorate since its inception.’<sup>310</sup> Prosecution is often simply viewed as a tool of inspection.<sup>311</sup> However, other writers suggest that the dual role of the HSE as an adviser and prosecutor militates against real effectiveness in either role.<sup>312</sup> So much so that some argue for the transference to the police of the role of investigation of all workplace fatalities. There is a belief that if the police investigate there is more likelihood that prosecution will ensue.<sup>313</sup> Freiberg claims that ‘The major difference between the police force and regulatory agencies is that the latter do not see their task as catching ‘criminals’ but as containing deviance. They do not seek to stigmatise their subjects but rather to obtain compliance through negotiation. Most crucially for non-police bodies, the criminal law is regarded as a last resort.’<sup>314</sup>

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<sup>307</sup> Hutter and Lloyd Bostock, n. 4 at p. 417

<sup>308</sup> Hutter and Lloyd Bostock, n. 4 at p. 417

<sup>309</sup> Glasbeek, n. 27 at p. 134

<sup>310</sup> Carson, ‘*White Collar Crime And The Enforcement Of Factory Legislation*’ 1970 10 *British Journal of Criminology* 383-393 at p. 393

<sup>311</sup> Carson, n. 310 at p. 393

<sup>312</sup> Dunford and Ridley, n. 5 at p. 3 op cit.

<sup>313</sup> Trotter, ‘*Double Jeopardy And The Cost Of Death*’ 1996 146 *New L. J.* 1418-1419 at p. 1419

<sup>314</sup> Freiberg ‘*Enforcement Discretion And Taxation Offences*’ 1986 3 *Australian Tax Forum* 55- 91 at p. 65

Many have criticised the 'cosy' relationship between the regulators and the regulated.<sup>315</sup> Carson, for example, talks of a classic symbiotic relationship between multinational oil companies and United Kingdom State.<sup>316</sup> The HSC/HSE 1988-9 Annual Report states 'HSE inspectors do not approach their task with a view to seeking out legal violations and prosecuting error. They seek to promote reasonable compliance with good standards.' However, the adoption of this compliance strategy is the subject of widespread criticism.<sup>317</sup> Hawkins explains that,

'Compliance strategy seeks to prevent a harm rather than punish an evil. Its conception of enforcement centres upon the attainment of the broad aims of legislation, rather than sanctioning its breach. Recourse to the legal process here is rare, a matter of last resort, since compliance strategy is concerned with repair and results, not retribution.'<sup>318</sup>

Kagan describes compliance strategy as 'retreatist',<sup>319</sup> and indeed it has been suggested that compliance only works if the threat of prosecution remains.<sup>320</sup> However, James argues that compliance strategy should not be lightly dismissed on the basis that,

'Significant improvements in health and safety standards are consequently unlikely to be achieved unless steps are taken to raise the status and importance accorded to those responsible for its management. This cannot be achieved simply through a process of propaganda. What is needed is the development of a legal framework that not only more clearly outlines the obligations of employers in respect of health and safety but ensures that there are adequate pressures exerted both internally and externally to ensure that the resources and management systems required to meet these obligations are forthcoming.'<sup>321</sup>

<sup>315</sup> Snider, 'The Regulatory Dance: Understanding Reform Processes In Corporate Crime' 1991 19 International J. of the Sociology of Law 209-236 at p. 221; Brown and Rankin, n. 301 at p. 325

<sup>316</sup> Carson in Wickman and Dailey (Eds.) n. 70 at p. 177; Before Piper Alpha there had been nearly 40 prosecutions. In the period 1980- Piper Alpha the total fines administered was 58,000 (Woolfson et al., n. 69 at p. 376

<sup>317</sup> Criticism of compliance strategy (see Field 'Without The Law? Professor Arthurs And The Early Factory Inspectorate' 1990 17 Journal of Law and Society 445-468; Bartrip and Fenn, 'Administration Of Safety: The Enforcement Policy Of The Early Factory Inspectorate 1844-1864' 1980 58 Public Administration 87; Carson, n. 146

<sup>318</sup> Hawkins and Thomas, 'The Criminology Of The Corporation And Regulatory Enforcement Strategies' in *Enforcing Regulation*, (1984), at p. 4

<sup>319</sup> Kagan, *Regulatory Justice: Implementing A Wage Price Freeze* (1978) at pp. 94-6

<sup>320</sup> Gunningham, 'Negotiated Non Compliance' 1987 9 Law and Policy 69-95 at p. 84

<sup>321</sup> James, n. 289 at p. 100; see also Pearce and Tombs 'Ideology, Hegemony And Empiricism: Compliance Theories Of Regulation' 1990 30 British Journal of Criminology 423; Vogul, *National Styles Of Regulation: Environmental Policy In Great Britain And The United States*, (Cornell University Press, 1980); Hawkins 'Compliance Strategy, Prosecution Policy And Aunt Sally' 1990 30 British Journal of Criminology 444

Braithwaite also contends that inspectors' educative role, is more important than their enforcement role.<sup>322</sup> Most regulatory bodies utilise a degree of formal and public punishment to maintain habit forming value of law and deterrence.<sup>323</sup>

Baldwin argues that,

'Consensual regulation, as well as assuming that optimal; safety conditions coincide with optimal profit-maximising conditions, is aimed at the well informed, well- intentioned and well organised employer, who would present few problems if left wholly to self regulate. But many hazards relate to the ill-informed, ill-intentioned, and ill-organised employer who is left untouched by consensual regulation.'<sup>324</sup>

Fitzgerald and Hadden in their research paper for the English Law Commission indicate that the inspectorate has always preferred to secure standards in health and safety by encouragement and persuasion 'rather than rigid enforcement of the letter of the law in all cases.'<sup>325</sup> Enforcement appears to be of the spirit of the law with education and correction taking primacy over prosecution.<sup>326</sup> According to Dickens, Inspectors 'are aware of being judged practically and politically by the efficiency with which they secure the purposes of the law, and so a minor offence or technical infringement will be taken to indicate where they must apply their energies rather than from where they must withdraw by referring the matter to the courts.'<sup>327</sup> Their attitudes to the nature of crime are usually significant.<sup>328</sup> For others the real solution is an optimal mix between punishment and persuasion.<sup>329</sup>

The adversarial process between corporations and enforcers can be transformed into a negotiation exercise.<sup>330</sup> Whilst 'negotiation is not the normal way for a sovereign state to control private units, given the power of corporations (see Chap. 1) it

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<sup>322</sup> Braithwaite, 'Challenging Just Deserts: Punishing White-Collar Criminals' 1982 73 J. of Criminal Law, Criminology and Police Science 723-763 at p. 752

<sup>323</sup> Braithwaite, n. 322 at p. 754

<sup>324</sup> Baldwin 1995, at p. 153 quoted in Woolfson et al., n. 69 at p. 430

<sup>325</sup> Fitzgerald and Hadden, (1977) Paper 1-64, at p. 17

<sup>326</sup> Dickens, 'Discretion In Local Authority Prosecution' 1970 Criminal L. R. 618-633 at p. 627

<sup>327</sup> Dickens, n. 326 at p. 631

<sup>328</sup> Freiberg, n. 314 at p. 64

<sup>329</sup> Gunningham, n. 320 at pp. 90-91

<sup>330</sup> Braithwaite, n. 250 at pp. 315-6



appears to many commentators a sensible way to proceed.<sup>331</sup> There is an initial assumption that all employers are keen to meet their legal obligations and that it is virtually impossible to run a business without violating the strict letter of the law.<sup>332</sup> Prosecution and conviction does not necessarily ensure compliance though it might spur on recalcitrant employers to do better.<sup>333</sup> In addition prosecution might not be considered appropriate or necessary; the decision to prosecute involves a multiplicity of factors.<sup>334</sup> The past record of the company and prior dealing may be as instructive as the nature of the incident. Irrespective of this, it seems clear that prosecution is 'seriously considered' where serious injury or death ensues from a serious breach of the relevant law, and as Fitzgerald and Hadden recognise, 'the unlucky chance of a serious accident rather than the degree of fault of the firm in question may thus become a decisive factor.'<sup>335</sup>

There is a view that utilising regulation may put control of corporate criminal liability on a more sound footing than if only the criminal approach were available.<sup>336</sup> In one study 57.2 % executives thought that regulation was needed and that industry could not police itself. The reasons they gave were the unethical behaviour of top management, the greed of some corporations and that self regulatory measures cannot be enforced. Those who thought it could police itself did so on the basis that the market helps industry police itself and that associations can help regulate corporations.<sup>337</sup>

Blaikie recognises that 'accident prevention is not achieved solely by legal rules, but by a combination of extra-legal disciplines' all of which must operate within the confines of the law.<sup>338</sup> Regardless of the problems, there are those who defend the

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<sup>331</sup> Braithwaite, n. 250 at p. 318

<sup>332</sup> Fitzgerald and Hadden, n. 325 at p. 21

<sup>333</sup> Fitzgerald and Hadden, n. 325 at p. 23

<sup>334</sup> Fitzgerald and Hadden, n. 325 at pp. 28-31

<sup>335</sup> Fitzgerald and Hadden, n. 325 at p. 42

<sup>336</sup> Webb in Pearce and Snider, n. 268 at p. 346; cf. with the view that says regulation plays a limited role in controlling corporate violation Clinard, *Corporate Ethics And Crime - The Role Of Middle Management*, (1983), at p. 103

<sup>337</sup> Clinard, n. 336 at p. 107

<sup>338</sup> See Blaikie, n. 298 at p. 171; Fisse and Braithwaite, *The Impact Of Publicity On Corporate Offenders*, (1983), at p. 91

process of regulation. They argue that regulation is necessary because 'the unhindered play of market forces can create serious liabilities for society.'<sup>339</sup> Thomas describes the regulatory ethos by saying 'The received wisdom of traditional administrative law has been that regulatory agencies are capable of implementing clearly definable, objective goals requiring technical expertise. Today however, it is widely recognized that such a "rational actor" model is misplaced; the regulatory process is more properly conceived as essentially political- a balance of the competing demands of interests affected by agency decisions.'<sup>340</sup> This of course must be considered in the context of the fact that enforcement priorities are frequently determined at the field level.<sup>341</sup> Ranged against this is the view that regulation may be seen as the soft option as a 'path of least resistance' rather than reconstructing existing criminal laws.<sup>342</sup> Indeed, Robens himself thought there was limits on the extent to which external regulation could influence progressively better standards.<sup>343</sup>

One of the primary difficulties in addressing the problem of corporate liability for homicide revolves round the overlapping and co-existing scheme of regulatory offences found in such statutes as the HASAWA. There are those who believe that prosecution should only take place under regulatory schemes and that homicide crimes should be utilised against culpable individuals only. However, Corns argues that 'There is growing evidence that alternative civil regulation by way of enhanced factory and site inspections has failed to ensure adequate work conditions and accordingly, the criminal law should be deployed. Homicide prosecutions could act as a specific and general deterrent, forcing corporations to implement more rigorous safety procedures to prevent accidents and deaths occurring in the first place.'<sup>344</sup> However, there is a danger in such an approach identified by one Australian study which said,

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<sup>339</sup> Thomas in Edelhertz and Overcast (Eds.), *White-Collar Crime - An Agenda For Research*, (1982), at p. 99

<sup>340</sup> Edelhertz and Overcast (Eds.), n. 339 at p. 105

<sup>341</sup> Edelhertz and Overcast (Eds.), n. 339 at p. 109

<sup>342</sup> See Laughran, 'The Law And The Corporate Polluter' 1972 23 Mercer L. R. 571 at p. 582

<sup>343</sup> See Robens para 41; James, n. 289 at p. 97; Gunningham, n. 320 at p. 83

<sup>344</sup> Corns, n. 17 at p. 363

'plucking out a few egregiously offensive cases to be subjected to the rigours of 'real' criminal law would only serve to advance a structurally underpinned historical process whereby the rest of occupational health and safety crime, what was left behind so to speak, would come to be perceived as even less criminal than it already is. The proponents of the case for manslaughter charges..were unwittingly colluding in a further decriminalization of occupational health and safety cases, and for that reason we proposed that, instead, a new offence of causing death by violation of OHSA, or its associated regulations, should be incorporated into the Act itself. Alternatively, an offence of industrial homicide should be inserted into the Act itself.'<sup>345</sup>

Would a rare sensational manslaughter or culpable homicide case really undermine health and safety law ? Corns thinks not.<sup>346</sup> He argues that manslaughter prosecutions are likely to enhance the profile of health and safety violations.<sup>347</sup> Corns concludes by arguing that if corporations are not to be included within the current ambit of traditional common law offences then new statutory homicide violations should be created.<sup>348</sup> Roben's view was that 'traditional concepts of criminal law are not readily applicable to the majority of infringements which arise under this type of legislation..[Few offences] arise from reckless indifference to the possibility of causing injury.'<sup>349</sup> But how true is this ? Whilst intentional infliction of injury may be rare, the same cannot be said of recklessness or negligence. The co-existence of a regulatory health and safety regime and the applicability of the general criminal law does create certain tensions within the system. There is nothing illogical or inconsistent in their co-existence. The situation can be rationalised on a simple 'horses for courses' basis. The compliance strategy inherent in regulation should remain central to any system of criminal law. The application of traditional homicide laws should be reserved for particularly evocative and egregious instances. In circumstances where the strategy is to develop an offence of corporate killing as an alternative to traditional homicide laws, it will be imperative that corporate killing is not downgraded to being merely a regulatory infraction. Corporate killing must attract the same stigma that those traditional crimes currently have. Essential

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<sup>345</sup> *Victorian OH and S-An Assessment Of The Law In Transition*, La Trobe /Melbourne Occupational Health and Safety Project (1990), at p. 147

<sup>346</sup> Corns, n. 17 at p. 364

<sup>347</sup> Corns, n. 17 at p. 365

<sup>348</sup> Corns, n. 17 at p. 366

<sup>349</sup> Robens Report (1972), para 26.1

to the way the crime will be viewed is the way it will be policed, enforced, and punished. It will be a crime which will attract the highest of penalties and invoke public outrage. In my outline model I make provision for the retention of existing regulatory offences relative to health and safety which may be labelled as alternative charges against corporations facing a homicide charge.

### 5.9 Scots Law And Corporate Homicide

Homicide law in Scotland enshrines the individualistic drive of Scots criminal law.<sup>350</sup> But while it has never been used against the corporation it nevertheless contains interesting possibilities. In Scotland the crime of culpable homicide is not unitary; there is a distinction made between situations where death ensues from an intrinsically lawful act and those deaths arising from an unlawful act.<sup>351</sup> In two particular authorities there is tacit approval for the doctrine of lawful act culpable homicide. In *Lord Advocate's Reference (No 1 of 1994)*<sup>352</sup>, the High Court of Justiciary following its earlier decisions of *Khaliq v HMA*<sup>353</sup>; *Ulhaq v HMA*<sup>354</sup> decided that the decision of someone to consume drugs supplied by the accused did not break the chain of causation between the death and the supply of drugs where that person died following the drug abuse. The tacit approval arrives in the form that the prosecution did not pursue this as unlawful act homicide and proceeded on the basis that recklessness was necessary. In *Sutherland v HMA*<sup>355</sup> the accused with the assistance of another had set fire to his own property in an attempt to defraud insurers. In the course of the act, the person assisting him was burned to death. Setting fire to one's property was considered a lawful act and as such the court expressly deliberated on the issue of criminal negligence or recklessness. As a consequence of these decisions, corporations cannot seek to shield behind any claim that what they were doing was intrinsically lawful. The lawfulness of their conduct will not preclude criminal liability for homicide.

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<sup>350</sup> Farmer, *Crime Tradition And Legal Order* (1997) at p. 166

<sup>351</sup> Ross, n. 186 at p. 75; For a history of culpable homicide see Farmer, n. 350 pp. 143-151

<sup>352</sup> 1995 SLT 248

<sup>353</sup> 1984 SLT 137

<sup>354</sup> 1991 SLT 614

<sup>355</sup> 1994 SLT 634

Culpable homicide is defined by Macdonald as occurring 'where death is caused by improper conduct and where the guilt is less than murder.'<sup>356</sup> Gordon sub-classifies culpable homicide into voluntary culpable homicide and involuntary homicide.<sup>357</sup> The first occurs where there is mitigation by way of provocation or diminished responsibility. The latter arises where the mental element is less than the *mens rea* of intention required by murder. Ross notes that there is the potential for confusion between murder caused recklessly and culpable homicide caused recklessly.<sup>358</sup> Her solution is to utilise the phrase wicked recklessness for murder.<sup>359</sup> Macdonald's own formulation is that of 'total recklessness' which Ross suggests might be considered 'to amount to the displaying of complete indifference, not just to foreseeable consequences but to the question of whether someone lives or dies.'<sup>360</sup> Hume describes it as 'utter indifference about the safety of the sufferer' and intent to do any 'great and outrageous bodily harm.'<sup>361</sup> Jones and Christie describe this recklessness as an objective assessment of intent.<sup>362</sup> Generally speaking, the criminal state of mind is always difficult to tell and is usually inferred from conduct.<sup>363</sup>

Involuntary culpable homicide can be further divided into two categories; those committed in the course of a lawful act and those committed in the course of an unlawful act. According to Ross, the Scottish courts have moved away from the position that death caused by negligence or "rash performance" or by "great heedlessness and indiscretion" or "want of due caution and circumspection" amounts to culpable homicide to the modern position which requires a higher level of mental element.<sup>364</sup> In respect of lawful act culpable homicide, Lord Justice Clerk Aitchison in *Paton v HMA*<sup>365</sup> submits that 'it is now necessary to show gross, or

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<sup>356</sup> Macdonald, *Criminal Law*, (5th Ed., 1948) at p. 96

<sup>357</sup> Gordon, n. 267 at para 25-01

<sup>358</sup> Ross, n. 186 at p. 76

<sup>359</sup> Ross, n. 186 at p. 76

<sup>360</sup> Ross, n. 186 at p. 76

<sup>361</sup> Hume, I at p. 191

<sup>362</sup> Jones and Christie, *Criminal Law* (1995), at p. 193

<sup>363</sup> See Edwards, n. 165 at p. 191; Devlin J in *Roper v Taylor's Central Garages* (1951) 2 TLR at p. 288

<sup>364</sup> Ross, n. 186 at pp. 76-77

<sup>365</sup> 1936 SLT 298 at p. 299



wicked, or criminal negligence, something amounting, or at any rate analogous, to a criminal indifference to consequences.<sup>366</sup> Recklessness was omitted from Lord Aitchison's formulation though Ross points out that in subsequent years the word "wicked" has become equiperated with "gross" and that "gross negligence" has become analogous to recklessness.<sup>367</sup> In the *Sutherland* case *supra* the trial judge attempted to distinguish between the gross negligence required for culpable homicide and a reckless disregard for safety. Such an approach may have significant consequences for the accused corporation. However, the appeal court was dismissive arguing that 'that these are all rather broad expressions the meaning of which tends to merge one with the other.'<sup>368</sup> Gordon's view is that if a charge of lawful act culpable homicide were brought in today's Scottish courts there would be a need to establish a high degree of negligence such that it was 'gross, palpable and wicked negligence.'<sup>369</sup>

The discussion surrounding lawful act culpable homicide is therefore principally one concerning recklessness.<sup>370</sup> Unlawful act culpable homicide is somewhat different; Hume argued that any death which arose from 'wrongful purpose to do any bodily harm' or from 'wrong and unlawful' act amounted to culpable homicide.<sup>371</sup> Macdonald contended that 'doing an unlawful act, where death could not reasonably be foreseen as a probable consequence of the act' could nonetheless amount to culpable homicide.<sup>372</sup> There has been an absence of redefinition by cases subsequent to these writings.<sup>373</sup> Gordon's view is that unlawful act culpable homicide should be restricted to cases where there is intent to do physical harm.<sup>374</sup> In assault cases are

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<sup>366</sup> See also *Sutherland v HMA supra*; Gordon, n. 267 at para 26.09-26.15; *HMA v Harris* 1993 SLT 963 at p. 970 per Lord Morrison

<sup>367</sup> Ross, n. 186 at p. 77

<sup>368</sup> *HMA v Sutherland supra* at p. 85

<sup>369</sup> Gordon, n. 267 at p. 794

<sup>370</sup> Gordon contends that foreseeability of consequence is not necessary for culpable homicide by recklessness. Gordon, n. 267 at p. 96

<sup>371</sup> Hume, 1 n. 361 at p. 191: see *R v Church* [1965] 1 QB 59

<sup>372</sup> Macdonald, n. 356 at p. 96

<sup>373</sup> Ross, n. 186 at p. 77

<sup>374</sup> Gordon, n. 267 at para 26-23 - 26.26 see also his commentary on Lord Advocate's Reference *supra* at p. 186; *Bird v HMA* 1952 SLT 446; Gane and Stoddart, *Criminal Procedure In Scotland: Cases And Materials* (2nd Ed. 1994) at p. 183

essentially dealt with on the basis of causation and not on basis of *mens rea*.<sup>375</sup>

Interestingly, Ross asserts that,

‘It is no means clear that the same straight forward, if harsh, approach is applied to death caused by doing any other unlawful act than that of assault, nor is it clear which unlawful acts may found the rule. Hume did not restrict the rule to assault, referring to any wrongful purpose to do any bodily harm, or to unlawful acts with such a purpose, but included any wrong and unlawful act.’<sup>376</sup>

Ross notes one further problem and that is that ‘lawful act’ and unlawful act’ are not determined by recourse to ordinary language but by reference to law.<sup>377</sup> What are the implications of this for health and safety? Ross argues that,

‘The failure of the High Court to clarify the status of the unlawful act culpable homicide rule, and the tendency to discuss recklessness without clarifying whether the recklessness is in relation to the mental element of the basic crime or of the culpable homicide, means there is a lack of clarity not only about the unlawful act rule but also about the nature of the mental element for culpable homicide. The recklessness required for culpable homicide is not so great as the recklessness required for murder. It is the gross negligence amounting to criminal indifference as asserted by Lord Aitchison in *Paton v HMA*.’<sup>378</sup>

The admission that there is some confusion regarding culpable homicide in Scotland need not deter the application of that crime to the corporation. On the one hand the distinction between lawful act and unlawful whilst instructive does not preclude the operation of culpable homicide to the body corporate and on the other, by moving to corporate fault as the basis of liability, the confusion as to *mens rea* of culpable homicide is rendered superfluous.(see para 5.5 above) As I have alluded to elsewhere, the real merit in understanding the existing *mens rea* is in the assistance it gives us in determining the standards applicable to corporate failing. The essence of the gross negligence and recklessness which Ross talks of must be carried forward into our conception of corporate fault.

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<sup>375</sup> Ross, n. 186 at p. 77

<sup>376</sup> Hume n. 361 at p. 78; see also *Mathieson v HMA* 1981 SCCR 196; *Lourie v HMA* 1988 SCCR 634

<sup>377</sup> Ross, n. 186 at p. 79

<sup>378</sup> Ross, n. 186 at p. 79

Because culpable homicide is the offence in Scotland which most readily equates with manslaughter in the Anglo-American tradition, there might be a tendency to discuss it to the exclusion of the other, more serious, homicide offence of murder. Yet on a deeper analysis of the law there appears no theoretical reason why such a charge cannot be laid against a corporation. The murder/culpable homicide distinction is based on the quality of the wickedness attributed by the jury.<sup>379</sup> In Scotland the classical charge to juries in murder trials is extracted from Macdonald's *Criminal Law* where he defines it as 'any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences.'<sup>380</sup> The suggestion is that it is possible to commit murder in the absence of intention. Gordon's view is that 'It may not be logically indefensible to talk of objectively reckless conduct as evidence of intention, but it is logically indefensible to suggest objective recklessness can never be such that it gives rise at most to an inference of recklessness and not to one of intention.'<sup>381</sup> There is support in *Cawthorne v HMA*<sup>382</sup> for the proposition that recklessness is evidentiary support for the finding of intention, but that said, the case is not authority for that view.<sup>383</sup>

It is important to note that like culpable homicide, murder can also be sub-divided into voluntary murder and involuntary murder. Voluntary murder is murder committed intentionally. The intention may be inferred from the accused actings.<sup>384</sup> Involuntary murder can be committed unintentionally.<sup>385</sup> Recklessness akin to gross negligence nor foresight combined with acceptance of risk are not sufficient standards of recklessness to constitute the crime.<sup>386</sup> It appears that it will be necessary to exhibit that the accused intended to cause personal injury.<sup>387</sup> Whilst the technical possibility of corporations behaving in such a way must be conceded, it is

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<sup>379</sup> Farmer, n. 350 at p. 165

<sup>380</sup> Macdonald, n 356. at p. 89

<sup>381</sup> Gordon, 'Cawthorne And The Mens Rea Of Murder' 1969 Scots Law Times (News) 41

<sup>382</sup> 1968 SLT 330

<sup>383</sup> 1968 SLT 330 at p. 332

<sup>384</sup> Gordon, n. 267 at p. 731

<sup>385</sup> Gordon, n. 267 at p. 732

<sup>386</sup> Gordon, n. 267 at p. 733

<sup>387</sup> Gordon, n. 267 at p. 734

somewhat fanciful to suppose that these sort of circumstances offer useful exemplars of the way in which corporations behave. It will be a unique and almost unconscionable situation which gives rise to a situation where a corporation deliberately set out to cause injury to a victim. Such a recognition however, offers no rationale for the exclusion of the crime from consideration if the causative and mental elements exist.

Both common law homicide offences by definition do not specifically exclude corporations. If one accepts that corporations can exhibit the necessary *mens rea* for the commission of the crime then it is but a short step to conceding that corporations can commit these common law crimes. However, matters are not that simple; in respect of murder the issue of the mandatory punishment is problematic and, if corporations are in exceptional circumstances to face a charge of murder then, a concession on the issue of sentencing will be required. The options canvassed in chapter 4 (and another in this chapter) provide several alternatives not least corporate dissolution, or some of the other inhibitory sanctions, which readily can be equiperated with life imprisonment for the individual. If any new framework is to activate common law offences against corporations it will need to do so in the light of the punishment problem associated with murder charges. Specific exclusion of murder would at least clarify the situation. Culpable homicide has no such attendant problems. Whatever the eventual approach, it is axiomatic that our system of criminal law conveys a requisite level of distaste for the actions of the corporation which have resulted in fatality in an analogous way to how one would convey this to an individual perpetrator in similar circumstances of culpability.

### **5.10 Conclusion**

Gobert is critical of the application of conventional criminal law to corporations in that it attaches liability on the basis of outcome whereas greater consideration should be made of the grossly negligent or reckless company which by mere fortuity avoids occasioning harm. According to Gobert the 'solution may lie in defining crimes in terms of acts (or failures to act) and mental state without regard to results. Defendants, including corporate defendants, should be liable for the harms which

their actions or inactions risk causing.<sup>388</sup> Risk has an obvious link to recklessness. Wells suggest a two-fold test of 'did the defendant create an obvious and serious risk' and secondly, 'did the defendant give any thought to this risk.' She contends that recklessness based on practical indifference to risk might prove apt for corporate accountability. Wells further argues that corporations are different from individuals and that the contours of culpability should reflect those differences.<sup>389</sup> Others too have called for jurisprudential re-examination of the basis of liability. Some have called for intentionality to be exhibited through corporate policy. Others have sought redefinition of the criminal law to a system which either prompts appraisal of certain standards of behaviour or which attaches liability to the creation of risk rather than harm. Duff argues that recklessness could be equated with indifference claiming that 'The indifference which constitutes recklessness is a matter, not of feeling as distinct from action, but of the practical attitude which the action itself displays.'<sup>390</sup>

Examination of the law in Scotland and the experiences of the Anglo-American jurisdictions provides powerful persuasion (recognising that problems require to be overcome) of the view that posits 'all that should be required to make the corporation criminally liable is that the material elements of the offense occurred, that positive features of the corporate culture caused or encouraged their occurrence, and that the measure of corporate culpability fits the level of culpability prescribed for the offense.'<sup>391</sup> It is a recipe for retention of the common law homicide crimes, and their full application to the corporation on the basis of a new fault attribution model. Under our existing system of sanctions we are unable to sanction the corporation in the way that we punish individuals for the crime of murder. In chapter 4 some interesting suggestions might overcome this impediment. However, the real objection to the application of murder to corporations lies in the notion that it is instinctively a crime we have come to associate solely with the individual.

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<sup>388</sup> Gobert, 'Corporate Criminality: New Crimes For The Times' 1994 Criminal L. R. 722-735 at p. 724

<sup>389</sup> Wells, 'Corporations: Culture, Risk And Criminal Liability' 1993 Criminal Law Review 551-566 at p. 561

<sup>390</sup> Duff, n. 160 at p. 162

<sup>391</sup> Colvin, 'Corporate Personality And Criminal Liability' 1995 6 Criminal Law Forum 1 at p. 42



There may be an intuitive preference for the crime of murder to be applicable to corporations to cater for the almost inconceivable circumstances where the corporation behaves in an extraordinarily culpable manner akin to intending to kill or evincing a wickedly reckless mentality. Naturally, retention of the offence as a weapon against the corporation would require a revisitation to the issue of sanctions for the law of murder. Reluctantly, I have opted for exclusion of murder from my outline proposal in the belief that pragmatism dictates that widespread endorsement of any new system requires it. Whatever reservations there may be about including murder in any scheme, there can be no such reservations about culpable homicide. Its very terminology resonates with the concept we are trying to enshrine. Its core components of culpability and fatality are instantly applicable to the body corporate. In recognising corporate fault as a new *mens rea* to be added to those that already exist for individual offenders, the crime of culpable homicide may be readily applied where the corporate homicide is considered particularly egregious.

**CHAPTER 6**

***CORPORATE CRIMINAL LIABILITY AND SCOTS LAW-  
THE LESSONS OF ANGLO-AMERICAN JURISPRUDENCE***

**6.0 Introduction**

In the foregoing chapters I have attempted to identify several crucial issues germane to an effective system of corporate criminal liability. This concluding chapter attempts to draw these together and offer some analysis in a Scottish context. The central theme of this thesis has been that Scotland should develop a comprehensive system of corporate criminal liability and that this system should contain certain features either currently applied in the Anglo-American jurisdictions or propositions not yet tried but suggested by writers in those jurisdictions.

It has been claimed that,

‘the Scottish legal system of criminal law, is a system of common law-even more so than the English criminal law. To this extent, then, [it is] a common law system that has developed with a distinctive character on the margins of Anglo-American criminal law.’<sup>1</sup>

It is not just the relationship that the Scottish legal system has with Anglo-American systems which underpins the rationale for the application of their jurisprudence to our system. An altogether more satisfactory reason lies in the strength of the principles they have evolved, and in the depth of the experience of corporate criminal liability within those jurisdictions. Drawing from the Anglo-American jurisprudence offers the opportunity to develop a properly constructed system of corporate criminal liability and to fill an obvious void in our own legal system.

Any proposed system of corporate criminal liability should be both pragmatic and pluralist; such a framework can most readily be developed by way of statutory enactment overlapping, without disturbing, existing statutory crimes and activating where appropriate certain common law crimes. In dealing with corporate criminal

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<sup>1</sup> Farmer, *Crime Tradition And Legal Order* (1997) at p. 19

liability *de novo* it will be imperative that the language is both accurate and coherent. The Anglo-American jurisprudence adequately illustrates the difficulty in framing principles. Fortunately, because of the availability of so many ideas, we do not start with a blank canvas. The task is nevertheless a considerable challenge. It is to take some of those ideas and fashion them in our own way, and in that way to develop a framework which engenders broad support. My proposal in outline is that there should be a statutory enactment which takes the important step of clarifying the various issues of corporate criminal liability within the Scottish legal system. The enactment would not seek to overrule those other statutes which exist (primarily in the regulatory field) where the basis of attribution may be strict or vicarious liability. It would maintain dual reliance on regulatory and 'true' criminality. It would, accordingly, not alter the imposition of individual liability on key agents within the organisation where statutory enactments so provided. Nor would it impede the imposition of individual criminal liability for common law crimes. Because it would be important that corporations did not face double jeopardy at every turn, there may be a need to re-appraise those regulatory offences in the light of the application of certain common law crimes; some regulatory offences may require to be repealed. Some common law crimes would be excluded from corporate criminal liability. In particular, given my concluding remarks in Chapter 5 of this thesis murder would be excluded. The new framework legislation would make clear those common law crimes attributable to the corporate form and would also provide for a basis of the attribution of fault on the basis of corporate fault. The new provisions would provide for a pluralist approach to both liability and sanctions. Punishments would be potentially more sanguine and varied than those currently in use. However, before addressing these proposals for a future framework, it is perhaps worth considering the existing Scots law pertaining to corporate criminal liability in an effort to both substantiate my premise that Scots law on corporate criminal liability is under-developed, at times incoherent and relatively ineffective and also with a view to showing the poor base upon which we may operate. It is in my opinion one that requires wholesale reformation and elucidation. To date inertia as well as scepticism has blocked reform. It is time

that both were placed to one side and a proper framework of corporate criminal liability constructed.

### **6.1 Scots Law And Corporate Criminal Liability**

The jurisprudence in Scotland on the subject of corporate criminal liability is very limited. In all of the major criminal law textbooks it justifies no more than a few paragraphs. In the indigenous legal journals, there are only three scholarly contributions on the subject.<sup>2</sup> Despite the supposed historic insularity of our system Scots criminal law is not uniquely Scottish. Whilst a case can be made for claiming that our common law retains its own integrity, no such case can be made in respect of statutory crime. Many statutory enactments which impose criminal liability on corporations have generic application across the United Kingdom. The principle criminal procedure statute - Criminal Procedure (Scotland) Act 1995- does recognise that corporations may be criminally liable but regrettably offers no real illumination of the subject. Section 70 of the 1995 Act recognises the ability of prosecutors proceeding against a 'body corporate' alone in summary criminal proceedings. The section also provides that where a corporation is sentenced to a fine, then that fine may be recovered by civil diligence. There is no mention of the possibility of any other sanction. In respect of more serious crimes, section 143(2) of the 1995 Act states that 'Proceedings may be taken against the...body corporate (b) in the case of [a] body corporate, the managing director or the secretary or other person in charge, or locally in charge, of its affairs may be dealt with as if he was the person offending, and the offence shall be deemed to be the offence of the ...body corporate.' No statistics are available on how often the prosecutors elect to proceed against individuals rather than the corporation. No guidance is offered by the statute and it is, accordingly, a matter of prosecutorial discretion. The language in both sections is not exclusionary. Nevertheless it is a somewhat unsatisfactory foundation on which to base a claim that Scots law unreservedly embraces the concept of corporate criminal liability. By specifically flagging up the possibility of proceeding against the corporate agent, there is almost a presumption that is to

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<sup>2</sup> See Ross, '*Corporate Liability For Crime*' 1990 Scot Law Times 265-270; See Whyte '*Corporate Criminal Liability*' 1987 SLT (News) 348-350; Stuart, '*The Case Of A Shameless Company*' 1980 Vol. 26 No 5 Journal of the Law Society 176-228

be the preferred option where it is at all possible. The limitations of these statutory provisions immediately instil a sense of dissatisfaction at their lack of clarity. Inevitably, one looks to case law to provide elucidation, but it is here we find the source of further frustrations.

In respect of common law offences, *Tesco Supermarkets v Natrass*, being a decision of the House of Lords, is not binding on Scottish criminal courts. Here the leading cases are *Dean v John Menzies Ltd*<sup>3</sup> and *Purcell Meats (Scotland) Ltd. v McLeod*.<sup>4</sup> In *Dean v John Menzies* the accused company was charged with shameless indecency in that they 'did sell, expose for sale and have for sale 64 indecent and obscene magazines..which magazines were likely to deprave and corrupt the morals of the lieges and to create in their minds inordinate and lustful desires.' Indicative of the limitations of our legal base is the fact that the case represented the first occasion in which a company had been charged with a common law offence in Scotland. The company successfully argued before the sheriff that the charge was incompetent. The Crown consequently took the matter to the Scottish Court of Criminal Appeal. In their appeal submissions, the Crown sought to found on the 'controlling mind theory' advanced in the English case of *Tesco Supermarkets v Natrass*. In response to the Crown's arguments the company offered various responses. First, there was no known case where a company had been charged with a common law offence and as such this was indicative that no such charge could lie against a company. Secondly, that as a limited company was a creature of statute, criminal liability could only be imposed by statute. Thirdly, that the offence of shameless indecency required the imputation of personal characteristics to the corporate form which a company was incapable of exhibiting. The High Court of Justiciary dismissed the appeal (Lord Cameron dissenting) and held the charge incompetent. However, analysis of the case is problematic due to the inconsistent approach adopted by all three judges. Lord Stott was prepared to concede that a company could be guilty of certain crimes and indeed that it could exercise some degree of criminal intent. His view was that a sense of shame could

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<sup>3</sup> 1981 SLT 50

<sup>4</sup> 1987 SLT 528; discussed in Whyte n. 2



not be imputed to a company. He was also rather unflattering as to the concept of identification theory describing it as a 'somewhat nebulous doctrine.' He also expressed some doubt as to its applicability in Scots law. His view was that if the Crown could identify the controlling minds they should proceed against them individually. Lord Stott did not seem concerned that incorporation may act as a shelter for criminal conduct.. Stuart suggests that Lord Stott misunderstood the public policy issue before him and that he had failed to see that individual booksellers would be attracted to incorporation on the basis that it would afford protection from criminal prosecution.<sup>5</sup> Arguably though, in such an enterprise the small bookseller would be more readily identified as the controlling mind and continue in Lord Stott's reasoning to be liable for prosecution.

The second of the majority opinion judges, Lord Maxwell, also took the view that shameless indecency involved doing something 'which is defined by reference to a type of behaviour of which human beings alone are capable.' His *dictum* nonetheless did not firmly close the door on the ordinary criminal law being applied to corporations.<sup>6</sup>

Lord Maxwell also exhibited some scepticism of the controlling mind theory on the basis that the English decisions were not conclusive and that there was not 'one clear and precise fiction.' His conclusion was that,

'in the light of the authorities cited to us, I am not satisfied that the common law of Scotland recognises any clear single fiction which would for the purposes of criminal responsibility in all matters attribute to a company the kind of human characteristics and conduct alleged in this complaint. It appears to me unrealistic to suggest that the accused company will be guilty if, but only if, some individuals or individuals whose status is not precisely defined but must be vaguely at or near director level had knowledge of the contents of the magazines in question and acted in a shameless and indecent manner in deciding to sell them. That, however, seems to be the result of applying the controlling mind fiction. If some other fiction is to be applied, I do not know what it is....It may be that the criminal law of England would reach a different result. If so it would not be for the first time.'<sup>7</sup>

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<sup>5</sup> Stuart, n. 2 at p. 177

<sup>6</sup> See *Dean v John Menzies (Holdings) Ltd.*, n. 3 at pp. 60-65

<sup>7</sup> *Dean v John Menzies (Holdings) Ltd.*, n. 3 at p. 64

The dissenting judge, Lord Cameron, identified the question before him as 'whether a limited company acting in the course of its ordinary and legitimate business, can be prosecuted for a common law offence, where its action in its specific facts would in the case of an individual render him liable to prosecution for a contravention of the common law.' Lord Cameron dismissed any suggestion of applicability of the doctrine of *ultra vires*<sup>8</sup> in this case on the basis that the company were clearly selling magazines in conformity with the objects of the company. Moreover, Lord Cameron recognised that corporations could be liable under statute for criminal acts. Indeed the then section 333 of the Criminal Procedure (Scotland) Act 1975 permitted proceedings against a company as well as the individual representatives of the company. Lord Cameron said,

'Section 333... makes no distinction between statutory crimes and common law offences and in particular contains nothing to indicate that its provisions only relate to breaches of statutes or regulations. If Parliament had intended that a company in its individual capacity should not be liable to prosecution in respect of common law offences, it could have said so and, at the same time, prescribed where and on what natural persons within the structure of the company, responsibility and consequent criminal liability should fall...If therefore a limited company has the capacity to form an intention to decide on a course of action to act in accordance with that deliberate intent within the scope and limit of its articles it is difficult to see on what general principle it should not be

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<sup>8</sup> Woods '*Lifting The Corporate Veil In Canada*' 35 Can Bar Rev 1176 (1957) argues that where the corporate form is dominated by a single person 'the distinct social reality of the corporate personality may be non-existent.'; Welsh '*The Criminal Liability Of Corporations*' 1946 62 Law Quarterly Review 345-365 rejects the notions of *ultra vires* as a basis for excluding criminal liability of corporations. In Welsh's view at p. 347 such an approach 'clearly rests on the fallacious supposition that civil capacity and criminal responsibility are governed by the same considerations.' In respect of *ultra vires* doctrine Smith and Hogan, *Criminal Law* (1992) contend that it has only been utilised in the law of contract and property and not in respect of tort and crime at p. 105; Burrows '*The Responsibility Of Corporations Under Criminal Law*' 1948 Criminal Science 1-19, at p.1 explains the *ultra vires* argument thus 'As the law does not countenance the formation of corporations for unlawful purposes..it would be a simple and logical deduction to say that no corporation can do or authorise an unlawful act.'; Edgerton '*Corporate Criminal Responsibility*' 1927 36 Yale Law Journal 827-844, at p. 839 exposes the poverty of the *ultra vires* argument. He says the '*ultra vires* character [of the act] furnishes no logical reason for relieving the corporation from responsibility of the crime. Its *ultra vires* character ..means no more than that the corporation was not authorised by the state to commit any crime; but obviously no one is authorized by the state to commit any crime. Incorporation was a means to escape liability and as a means of insulation; see also Hallis, *Corporate Personality- A Study In Jurisprudence* (1978) at p. 8; Leigh, *The Criminal Liability Of Corporations In English Law* (1969), at pp. 8-9).

susceptible to prosecution where the action offends against the common law.<sup>9</sup>

Accepting that companies could be criminally liable for statutory crimes involving knowledge and intent, Lord Cameron concluded that,

‘If a company can by law- by legal fiction if you will- be endowed with mind and will exercisable by natural persons acting within the confines of the company’s competence and be held responsible for actings in pursuance of the exercise of that mind and will, then if those actings are contrary to the common criminal law, I find it difficult to see upon what basis of principle it can be said that the company is free of criminal liability however this may be enforced.’<sup>10</sup>

Lord Cameron also offered the argument that *mens rea* could be inferred or presumed in all acts which were criminal at common law. He said ‘The wicked intent in all common law crimes is the intent to perform the criminal act. The motive or moral depravity of the actor are alike irrelevant to the quality of the act in the eye of the law. Therefore, if the act is intentional the criminal intent is presumed whatever the motive which inspired the actor.’ This conception offers interesting possibilities as to the application of common law crimes to corporations in Scotland. Rather than seek to locate the necessary criminal mind within the confines of the corporation or its actors, we can, it is submitted, make a qualitative assessment as to intention from the proven facts and circumstances on an almost *post hoc* basis. Such an approach offers the prospect of adoption of the corporate fault method of assessment of the corporation’s *mens rea* canvassed in chapter 2 (and to which I will subsequently return).

Though *Dean v John Menzies* represented the first time in a common law criminal case where the issue of locating the criminal mind of the corporation was discussed, there had been several interesting earlier pronouncements in some Scottish civil cases and some cases involving breaches of criminal statutes. One such civil case is *Gordon v British and Foreign Metaline Co.*<sup>11</sup> where the pursuer, who had hitherto worked for the defenders, had raised an action against the

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<sup>9</sup> *Dean v John Menzies (Holdings) Ltd.*, n. 3 at p. 55

<sup>10</sup> *Dean v John Menzies (Holdings) Ltd.*, n. 3 at p. 56

<sup>11</sup> (1886) 14R 75.

defender company for *inter alia* judicial slander following a breakdown in relations between the parties. The Lord Justice Clerk stated,

‘It may be quite true in one sense that the company cannot be guilty of moral wrong. It is said that a company has no *animus*. Nor has it. It has no will, it has no memory, it has no conscience. But withstanding all that, the supposed or imaginary *persona* which constitutes a company may contract obligations although it has no will, memory, or conscience, and may be compelled to fulfil the obligations so undertaken. It is a mere metaphysical subtlety to say that a company cannot be guilty of malice where the very nature of the proceeding in which the plea is taken necessarily implies that the *persona* has a power of action and a power of judgment.’<sup>12</sup>

As Stuart points out the Lord Justice Clerk did not offer any guidance on whether the exercise of these physical characteristics were undertaken by individuals who for these purposes are considered the company or whether some other legal fiction required to be used.<sup>13</sup>

Another case altogether more significant is that of *Clydebank Co-operative Society v Binnie*<sup>14</sup> where the accused company was charged with permitting a motor vehicle to be used as an express carriage without a Public Service Vehicle Licence as required by the Road Traffic Act. To succeed the Crown had to establish knowledge on the part of the accused. The Lord Justice-General found that the knowledge could be attributed from the knowledge of the transport manager and the driver. No indication is offered in the case as to the basis on which this attribution of knowledge was to take place. The inference of the driver’s knowledge suggested to Stuart that the basis must have been vicarious liability as the driver could not be considered a controlling mind of the company in conformity with the *dicta* in *Natras*.<sup>15</sup>

In *McNab v Alexanders of Greenock Ltd*<sup>16</sup> Lord Justice-Clerk Grant indicated that it was only through officers and servants acting that the company could be liable.

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<sup>12</sup> *Gordon v British and Foreign Metaline Co.* (1886) 14R 75 at p. 84

<sup>13</sup> Stuart, n. 2 at p. 223; cf. *Finburgh v Moss Empires Ltd* 1908 SC 928; *Beaton v Glasgow Corporation* 1908 SC 1010

<sup>14</sup> 1937 JC 17

<sup>15</sup> Stuart, n. 2 at p. 223

<sup>16</sup> 1971 SLT 121 at p. 125

Again we are left 'in the dark' as to the imputation of the criminal mind. The concession that the actions of servants can create liability is nonetheless interesting and alludes to a concession that lower order human agents may exhibit the corporation's *mens rea*.

A further case worthy of note is that of *Mackay Bros. v Gibb*<sup>17</sup> where a partnership was charged with permitting a vehicle to be used where the tread was so low as to be considered illegal. In order for the charge to be sustained it was necessary impute knowledge of the defect to the firm. In imputing the garage controller's knowledge to the firm the Lord Justice-Clerk considered that the controller had constructive notice of the defect based on his wilful blindness to the possibility that the tyre may be defective. This is not a controlling mind theory approach on the basis of *Natrass* but there is nonetheless the imputation of knowledge albeit from a lower order employee. Lords Wheatley and Milligan in this case offered vicarious liability as the basis of imputation of liability to the firm but purely on a purposive approach to the statute. Lord Milligan in particular noted the absurdity of the situation when he said that the law would be 'completely ineffective in a case where the car was own by a limited company and I cannot think that Parliament ever intended this.'<sup>18</sup>

Where the statutory offence is one of permitting, it is recognised that the imputation of liability is vicarious. In *Noble v Heatley*<sup>19</sup> a licence holder was charged under section 131 of the Licensing (Scotland) Act 1959 with knowingly permitting drunkenness on his premises. Two people had been found drunk on the premises; supervision of the premises had been delegated by the licence holder to a manager who was in sole charge of the premises. It was accepted that the necessary knowledge of the statute could be vicarious. The court accepted that a licensee was under a duty to offer instruction to persons to whom they delegate

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<sup>17</sup> 1969 JC 216

<sup>18</sup> *Mackay Bros. v Gibb* 1969 JC 216 at p. 235

<sup>19</sup> 1967 JC 7



authority.<sup>20</sup> However, such a case only offers guidance in respect of certain statutory crimes and offers little in respect of common law crimes. In *Readers Digest Association Ltd v Pirie*<sup>21</sup> the company was charged with an offence under section 2(1) of the Unsolicited Goods and Services Act 1971 which provides that, 'a person who not having reasonable cause to believe there is a right to payment in the course of any trade or business, makes a demand for payment.. for what he knows are unsolicited goods sent then...to another person with a view to his acquiring them shall be guilty of an offence.' Sheriff McInnes, before whom the case called, found that it was company policy not to demand money for goods which had not been ordered and to cancel instructions when so requested by customers. The company's systems should ensure that improper demands for payment were not being made, but mistakes by junior employees led to demands for payment being made. Lord Justice-Clerk Wheatley claimed that,

'The facts...clearly show that there was no *mens rea* on the part of the company, or anyone who could be said to be the "the mind" of the company in relation to the despatch of the demand for payment.'<sup>22</sup>

In the same case, Lord Kissen also reflected upon *Natrass* and said in respect of the reasonable belief of entitlement to payment that there was 'no basis...for excluding errors of employees of a company as a circumstance or for holding that a company cannot have a reasonable cause for belief when information could have been obtained from records which would have altered that belief.' This statement is clearly interesting in respect of corporate omissions, corporate failure to supervise, and the nature of the knowledge to be imputed to the company. It also shows a willingness to look to the corporation as an entity for the necessary mental state rather than individuals within it. It is difficult to assess whether Lord Kissen truly saw the corporation as a collective entity capable of holding a 'belief' or whether his *dictum* was simply carefree use of language to which no deeper significance can be attached.

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<sup>20</sup> 1967 JC 7 at p. 10; See also *Vane v Yiannopoulos* [1965] AC 486; *James and Sons Ltd v Smees* (1954) 3 QBD 273; *Henshall (Quarries) Ltd. v Harvey* (1965) 2 QB 233; *Bean v Sinclair* 1930 JC 31; *Wilson v Allied Breweries Ltd* 1986 SCCR (JC) 17 Cf. *Westminster City Council v Croyalgrange Ltd.* [1986] 2 All ER 353 per Lord Bridge at p. 353

<sup>21</sup> 1973 SLT 170

<sup>22</sup> *Readers Digest Association v Pirie*, n. 21 at p. 176

In *Smith of Maddison Ltd v McNab*<sup>23</sup> a company was charged with causing or permitting the use of a vehicle with an insecure load. Here again the court did not feel compelled to state the basis on which liability could attach to the corporation. However, Lord Justice General Emslie did say that that the company ‘through their responsible officials’ knew that certain precautions were required to be taken in order to secure the load. They did not specifically instruct the employee to secure the load in that way. Importantly, Lord Emslie said that knowledge in respect of a contravention of a statute includes a state of mind where the accused shuts his eyes to the obvious in circumstances where something is likely to happen. He claimed ‘it [knowledge] may be inferred when the permittor has given no thought to his statutory obligations at all.’ In *McPhail v Allan and Dey Ltd*<sup>24</sup> the accused company was charged with a contravention of s112 of the Road Traffic Act 1972 with causing and permitting one of their employees to drive a heavy goods vehicle when he was not appropriately licensed to do so. Following the *ratio* of *Smith of Maddison v McNab* Sheriff Scott considered that to be guilty of the offence actual or constructive knowledge was required to prove permitting on the part of the company. In this case he held that the state of knowledge of the company’s transport manager was to be considered the state of knowledge of the company. Again no reference was made in the case to the controlling mind theory but it seems clear that the imputation of knowledge to the company is analogous to that approach albeit that this employee was not the controlling mind in the *Natras* ethos. Sheriff Scott in this case said ‘[imputed knowledge] can be inferred where some one allows another to do something when a contravention is likely or where he gives no thought to the statutory obligations at all or where he has good reason to suppose that a prohibited thing is happening and does nothing to prevent it.’<sup>25</sup>

In summarising these cases it was evident that Scots law had not (until the advent of *Purcell Meats v McLeod*) explicitly adopted any clear approach to the attribution of *mens rea* to the corporation. The statutory cases offer some support for the

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<sup>23</sup> 1975 SLT 86

<sup>24</sup> 1980 SLT (Sh Ct) 136

<sup>25</sup> *Smith of Maddison v McNab*, n. 24 at p. 138

contention that judges had been applying the identification theory as a model of fault attribution. Implicit support for the controlling mind theory was offered by Lord Wheatley and Milligan in *Readers Digest*, Sheriff Scott in *McPhail*, arguably in the case of *Smith of Maddison*, and perhaps less obliquely the decision in *Dean v John Menzies Ltd*. The attribution of guilt is often premised on the presumed intention of Parliament behind the statutory provisions but as Stuart points out,

‘in the case of a common law crime or offence..there is no such factor as Parliament’s presumed intention to justify the use, where required, of an appropriate fiction-..to enable corporate guilt to be proved by the attributing of human characteristics to the corporate body. With a common law offence, one simply has the relevant conduct and *mens rea* required to constitute the offence, all as laid down by authority.’<sup>26</sup>

Lord Maxwell in *Dean v John Menzies* was of the opinion that there was no clear fiction for the attribution of human characteristics and conduct to a company. However, the decision in *Purcell Meats* now affords credence to the view that the ‘controlling mind’ theory is operational in Scotland.<sup>27</sup> In *Purcell Meats Ltd v McLeod*<sup>28</sup> there was certainly a closer approximation to the approach taken in *Natrass* in England. It was suggested that it would be necessary for the Crown to show that,

‘the persons by whose hands the particular acts were performed were of such a status and at such a level in the company’s employment that it would be open to the sheriff to draw the conclusion that the acts fell to be regarded as acts of the company rather than acts of the individual.’<sup>29</sup>

The court itself offered no clear statement as to how such status should be determined.<sup>30</sup> However, *Purcell Meats* is significant on two principal counts. It represented the first occasion on which a company was successfully prosecuted for a common law crime and one requiring intent at that. Secondly, by the clear enunciation of part of the *Natrass* test in the judgment there was a clear signal that the controlling mind test was to be applied in common law crimes in Scotland in considering the liability of the corporation.

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<sup>26</sup> Stuart, n. 2 at p. 226

<sup>27</sup> See Whyte, n. 2; Gordon, 1987 SCCR at p. 677

<sup>28</sup> 1987 SLT 528

<sup>29</sup> *Purcell Meats Ltd v McLeod* 1987 SLT 528 at pp. 529-30

<sup>30</sup> See Whyte, n. 2 at p. 349

Subsequent to the decision in *Dean* but before the pronouncements in *Purcell Meats*, Stuart argued that 'What is required is a fiction which unambiguously indicates to a body corporate..the means by which human characteristics are to be attributed to it such that it might be guilty of the alleged crime.'<sup>31</sup> Stuart adopted a truculent view in dismissing Lord Cameron's suggestion in *Dean* arguing that,

'With respect, it is not satisfactory to introduce a fiction into Scots law with such radical consequences for criminal responsibility on the basis that there is uniformity of legal rules between Scotland and England in other areas of corporate law. If the liability of corporate bodies in civil and statutory criminal matters where human characteristics must be attributed to the body corporate is not based on the application of the controlling mind fiction, then the means by which such liability is established is unlikely to be relevant as regards liability for common law offences where the 'controlling mind' is considered the appropriate fiction. As far as statutory offences involving intention, knowledge etc. are concerned, it has been shown that there is little distinct support for the fiction in Scots Law and it has never been unequivocally applied. Further, it has been suggested that the use of the fiction in English cases has essentially been determined by the relevant statutory provisions. In any case, the controlling mind fiction may be considered as too imprecise to be a means of attributing human characteristics such as intention or knowledge to a company in order to render it responsible for a common law offence.'<sup>32</sup>

Despite the frequency of prosecutions under statute law, there remains reluctance on the part of prosecutors to prosecute corporations for common law crimes.<sup>33</sup> The provisions of the Criminal Justice (Scotland) Act 1995 permit the prosecution of corporations for common law crimes but offer no guidance on the exercise of prosecutorial discretion as to when and in what circumstances those prosecutions will take place. In Scots law (like many of the common law jurisdictions) there can be no vicarious criminal liability for crime in the absence of clear statutory provisions.<sup>34</sup> The absence of extensive discussion as to the nature of liability has led to a clear lacuna in the law. Various cases accept the imputation of knowledge and other mental attributes to the corporation; some of them do so on the basis of imputation of knowledge from agents or from employees of the company. Ross

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<sup>31</sup> Stuart, n. 2 at p. 227

<sup>32</sup> Stuart, n. 2 at p. 227

<sup>33</sup> Ross, n. 2 at p. 265

<sup>34</sup> In *Gair v Brewster* 1916 JC 37 at p. 38; *Duguid v Fraser* 1942 SLT 51 per Lord Mackay at p. 53

argues that 'It appears that in these cases there was something more than simple vicarious liability on the part of the company..for an employee's actions in the course of employment.'<sup>35</sup> *Readers Digest Association v Pirie*<sup>36</sup> offers little in the way of insight as to High Court's perception of the requisite status of the employee before imputation of knowledge will accrue. Lord Justice Wheatley argues that the secretary to Head of Information and a subordinate of a supervisor could not be considered the mind of the company. A more recent case adds further to the confusion. In *Brown v Burns Tractors Ltd*,<sup>37</sup> the accused company was charged with causing and permitting their employee to drive in breach of the regulations on the usage of tachograph and rest periods. The arrangements within the firm were that the drivers were under the supervision of a clerical assistant who reported to one of the directors of the firm. The Scottish Court of Criminal Appeal held that the clerical assistant was to be considered important within the administration of the organisation because that person had delegated authority and control.

If the basis of liability is uncertain, so too is the extent of the applicability of the common criminal law to corporations. Ross asserts 'It seems to be widely accepted that, even if it is competent to prosecute the fiction of a corporation, there is a limit to how far the fiction can be pursued.'<sup>38</sup> Lord Stott in *Dean v John Menzies* claimed that it was 'self-evident that there are certain crimes and offences which cannot be committed by a corporate body. Murder is such a crime, not only ..because a company cannot be imprisoned but because it is incapable of having the wicked intent or recklessness of mind necessary to constitute the crime of murder. Other example which come to mind are reset and perjury. In my opinion the offence of conducting oneself in a shameless indecent manner falls into the same category.'<sup>39</sup> Lord Stott's *dictum* can be criticised on several counts- the ability to sanction the corporation, the ability of the corporation to exhibit intent and recklessness and the ability of the corporation to commit certain crimes. At various

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<sup>35</sup> Ross, n. 2 at p. 266

<sup>36</sup> 1973 SLT 170

<sup>37</sup> 1986 SCCR 146

<sup>38</sup> Ross, n. 2 at p. 267

<sup>39</sup> *Dean v John Menzies Ltd*, n. 3 at p. 59



points throughout this thesis all of these issues have been addressed; I have pointed to alternative perspectives on all of these issues. Ross suggests that Lord Stott's view and Lord Cameron's in *Dean v John Menzies Ltd* exhibits a 'reluctance to stretch beyond the bounds of ordinary language or common-sense the idea of a fictional entity with no existence outside the law performing physical acts and having mental attitudes.'<sup>40</sup>

One of the major problems of the Scottish jurisprudence lies in the fact that the essence of corporate liability is rarely properly addressed. As Ross points out 'Objections to particular crimes are stated rather than argued.'<sup>41</sup> Ross is also critical of the confusion between liability and sanction. Just because the corporation cannot be imprisoned should not impinge upon the technicality of liability.<sup>42</sup> The position in Scotland as extrapolated from the existing case law, is that the court clearly feels there are some common law crimes which cannot be imputed to the corporation, but as Ross asserts 'no logical basis has been developed for distinguishing those crimes which a company is capable of committing from those which it is not.'

In the light of modern trends towards different models of attribution of corporate fault the debate as to the applicability of the alter ego doctrine in Scots criminal law seems rather stale. Ross is supportive of the aggregation theory of attribution but her comments must be read in the context of the prevailing knowledge at the time; jurisprudence has moved on apace in the past 7 years. Whatever may be the model of attribution, Ross is of the opinion that 'there is no logical limit to the crimes with which a company can be potentially charged.'<sup>43</sup> Whyte appears to be of a similar mind.<sup>44</sup> Ross claims 'the issue of corporate liability has arisen because of the desire to prosecute the "right" person. It can be argued that the company can be the appropriate person where those who control it take decisions which lead

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<sup>40</sup> Ross, n. 2 at p. 268

<sup>41</sup> See Whyte, n. 2 at p. 350

<sup>42</sup> Ross, n. 2 at p. 268

<sup>43</sup> Ross, n. 2 at p. 269

<sup>44</sup> Whyte, n. 2 at p. 350

directly to the commission of a crime; or where the company's ethics or organisation are perceived as making criminal activity likely.<sup>45</sup> Importantly, she contends that,

'prosecuting the company need not necessarily detract from the pursuit of the directors who have taken the decisions or the employees who have committed the wrongful acts...Prosecuting a corporation may in certain cases be the best way of ensuring that an organisation takes the position seriously and remedies whatever had led to the breach. Corporate criminal responsibility however needs to be given a less vague and more realistic basis.'<sup>46</sup>

Stuart's call for the development of a fiction which better attributes human characteristics to the corporations is, in the opinion of the writer, limited on the basis of its constraint. The search for a fiction whereby *mens rea* can be attributed to the corporation from the minds of individual actors within it suffers from a fundamental flaw which misses the real essence of corporate liability. For intellectual credence, corporate liability requires a corporate basis of attributing liability. Those writers in the Anglo-American jurisdictions who have sought to develop such a model have captured the essence of corporate criminal liability. In the process they have sought to transcend the strictures of individualising corporate crime. The decision in *Dean* is regrettable in that it offers no clear analysis of the basis on which a corporation can be found liable. It was thought that the outcome of *Dean* was that prosecutors are likely to prosecute individual managers rather than their corporations.<sup>47</sup> The absence of empiricism in Scotland ensures that it is difficult to test this thesis. What is beyond doubt is that there has been a dearth of reported decisions relative to prosecutions of corporations. Unlike Stuart who argues for the development of an unambiguous model which attributes human characteristics to the corporation my own preferred option is to adopt a corporate fault model. If nothing else, one of the key lessons from Anglo-American jurisprudence is that anthropomorphism has engendered more complexity and confusion than it has solved. Any new system of fault must attempt to transcend that approach as a basis of liability attribution. The three atomistic concepts

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<sup>45</sup> Ross, n. 2 at p. 269

<sup>46</sup> Ross, n. 2 at p. 270

<sup>47</sup> See *Miln v McCarlie*, *The Scotsman* 23/1/81

discussed in chapter 2 all have major failings. My outline proposal envisages the retention of vicarious liability and strict liability for those statutory offences where it already exists as part of the framework of corporate criminal liability. Identification can be rejected as an overly restricted basis on which to attempt to limit the corporate personnel through whom liability can flow. Aggregation is interesting but unnecessary; moreover, it has no genealogy in United Kingdom courts. The retention of vicarious and strict liability for certain statutory offences can be justified on the basis of continuity and on the existing public policy consideration which currently justifies their existence. For the common law offences to be retained, it will be necessary to exhibit corporate fault. Any framework will require to indicate how that corporate fault may be exhibited. The most obvious method of so doing is for an *ex post facto* assessment of the corporations policies, practices, systems and procedures. It is a formulation which I believe puts corporate criminal liability, as Ross *infra* has called for, on a more realistic and coherent basis.

## 6.2 Legislating For Corporate Criminal Liability

I have suggested that the most logical method of developing a coherent framework is through legislation. Several Anglo-American law jurisdictions have attempted to legislate for corporate criminal liability. Others have attempted to interpret existing statutes, particularly in the field of homicide, in the context of corporations being equated with a person.<sup>48</sup> The latter approach in many instances leads to unsatisfactory results. Invariably, the word 'person' requires definition. Magnuson and Leviton claim that person means an 'individual, public or private corporation, government partnership or unincorporated association.'<sup>49</sup> Not

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<sup>48</sup> E.g. Illinois Ann Stat Ch. 38 para 9-1 states (a) *A person who kills an individual without lawful justification commits murder if in performing the acts which cause death:*

(1) *He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or*

(2) *He knows that such actors create a strong probability of death or great bodily harm to that individual or another; or*

(3) *He is attempting or committing a forcible felony other than voluntary manslaughter*

<sup>49</sup> Magnuson and Leviton, 'Policy Considerations In Corporate Criminal Prosecutions After *People v Film Recovery Systems Inc.*' 1987 62 Notre Dame L. R. 913-939 at p. 916; Article 2 of the Code; Model Penal Code has essentially the same definition Article 5-4 permits corporate criminal liability for homicide where (1) the offence is a misdemeanour (2) there is legislative intent that the

everyone agrees with such anthropomorphic conceptualisation. Indeed as we have seen in chapters 1 and 3 the idea of corporate personhood is quite frequently challenged. Clearly in any statutory scheme, there will be no criminal liability of corporations where the statute unambiguously exempts them from criminal liability. Precision will be imperative in the linguistic construction of any statute.<sup>50</sup> Before proffering my own outline model it is perhaps worth looking at similar attempts to devise statutory schemes of corporate criminal liability.

Hamilton has offered a proposal for a code for the American State of Texas which has historically resisted an expansive formulation of corporate criminal liability.<sup>51</sup> The proposals were rejected by the State Bar of Texas and the State Bar Committee on Revision of the Penal Code but are nonetheless worthy of consideration. His provisions are as follows

*Sec 2.072 Liability of Corporations*

*(a) If conduct constituting the offense is performed by an agent acting in behalf of a corporation and within the scope of his office or employment, the corporation may be convicted of*

*(1) a petty misdemeanor [as defined]*

*(2) an offense defined by a statute other than this code in which a legislative intention to impose liability on corporations plainly appears; or*

*(3) an offense defined by a statute other than this code for which absolute liability is imposed, unless a legislative purpose not to impose liability on corporation plainly appears;*

*(b) A corporation may be convicted of an offense other than those described in Subsection (a) only if its commission was authorized, requested, commanded, performed or recklessly tolerated by*

*(1) a majority of the board of directors acting in behalf of the corporation; or*

*(2) a high managerial agent acting in behalf of the corporation and within the scope of his office or employment*

*2.074 Defense to liability of corporations and Associations*

*(a) In a prosecution of a corporation or association for an offense included within the terms of Sections 2.072 (a) (1) and (2) or 2.073, it is an affirmative defense that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission*

*(b) Subsection (a) does not apply if it is plainly inconsistent with the legislative purpose expressed in the statute defining the particular offense'*

*Sec 2.075 Liability of persons for conduct in behalf of corporations or associations*

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offence apply to corporations or (3) that the offence is approved of by the Board of Directors or a high managerial agent;

<sup>50</sup> Lee, 'Corporate Criminal Responsibility' 1928 28 Columbia L. R. 198 at p. 198

<sup>51</sup> R. Hamilton, 'Corporate Criminal Liability in Texas' 1968 47 Texas L. R. 62-85 at p. 77 ff.

(a) *A person is liable for conduct which he performs or causes to be performed in the name of or in behalf of a corporation or association to the same extent as if the conduct were performed in his own name or behalf*

(b) *An agent having primary responsibility for the discharge of a duty to act imposed by law on a corporation or association is liable for the intentional, known, or reckless omission to discharge the duty to the same extent as if the duty were imposed by law directly on him*

(c) *When a person is convicted by reason of his ability for conduct performed in the name of or in behalf of a corporation or association, he is subject to the sentence authorised by law when a natural person is convicted of an offense of the same grade and degree involved without regard to the sentence authorized by law for a corporation or association.*<sup>52</sup>

This type of formulation is interesting; in my model an important feature would be to delineate the 'true' crimes the corporation could commit and how it could exhibit the necessary *mens rea* for those offences. Hamilton's approach is different from my own in that he appears wedded to the notion of formulating corporate guilt through individual managerial actors within the corporate form. There may nonetheless be some merit in offering corporations a defence to any criminal prosecution they face. Herein, one faces a further dilemma. Should corporations be able to exhibit their own unique defences to criminal charges or should they be confined to those already conceded by Scots criminal law? This presents itself as a problem only in respect of common law offences. Existing statutory offences will maintain their own formulations and defences. In considering corporate fault through the body corporate's policies, procedures and practices a qualitative assessment will, of necessity, take place as to the culpability of the corporation. The only real defence is likely to be that of due diligence and reasonableness of precautions.

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<sup>52</sup> "Sec 2.071 Definitions

*In Sections 2.071 -2.075, unless the context requires a different definition,*

(1) "agent" means a director, officer, employee, or other person authorized to act in behalf of a corporation or association

(2) "association" means a government or government al subdivision or agency, trust, partnership, or two or more person having a joint or common economic interest; and

(3) "high managerial agent" means

(A) a partner in a partnership

(B) an officer of a corporation or association; or

(C) an agent of a corporation or association who has duties of such responsibility that his conduct reasonably may be assumed to represent the policy of the corporation or association



Leigh suggests a fundamental analysis of what corporations should be liable for and in what circumstances. The foundation of many modern crimes is to be found in the placing of social duties upon natural persons. In respect of the crimes which may be committed by a corporation Leigh argues 'there seems to be no single principle of a non-arbitrary character which will identify the offences that ought and the offences that ought not to be capable of commission by corporations and other bodies. The only imperative principle of exclusion would be derived from the definition of certain offences, making their commission by corporations legally impossible.'<sup>53</sup> My own proposal is that for clarity's sake that those crimes should be identified and excluded from consideration of corporate guilt. I am also prepared to recognise that those exclusions should not only relate to those offences thought incapable of commission by the corporation but also those excluded on policy grounds. There was a suggestion in the aftermath of *Purcell Meats* that there was no limit conceptually to those common law crimes capable of commission by the corporation.<sup>54</sup> Lord Cameron in *Dean* had suggested two limitations- Crimes for which a custodial sentence was necessary and those which required the human body for commission of the offence. On the face of matters there is much force in this assertion. However, we have seen in chapter 4 that custodial sentences might well be replicated and for the sake of completeness we should not simply utilise sanctions as a means of delimiting our criminal liability. Nonetheless, it makes good sense to retain an element of realism in our system. Concession that the corporation cannot commit every crime offers no offence. A coherent and supportable basis on which to proceed is to exclude those offences it is impossible, in law, for the corporation to commit. (*lex non cogit ad impossibilia*).<sup>55</sup> Alternatively, one could leave the ambit of liability unlimited and place reliance on prosecutorial discretion. That approach is a recipe for inconsistency and eventual anarchy. My own instinctive preference is for the delineation of those crimes relevantly applicable to corporations. On the basis of what I have said, I envisage only a few crimes being excluded from application to

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<sup>53</sup> Leigh, 'The Criminal Liability Of Corporations And Other Groups' 1977 vol. 9 Ottawa Law Review 247-302 at p. 288

<sup>54</sup> See Whyte, n. 2 at p. 350

<sup>55</sup> See Whyte, n. 2 at p. 350

the corporation. The list will include murder for the reasons I have outlined in chapter 5. Clarity in respect of those offences a corporation can commit will represent a substantial advancement in our legal system for its citizens and for corporations themselves.

In Australia, the Gibbs Committee proposed a new section 4B(A) of the Crimes Act which sought to set down the basis of corporate criminal liability. It states

*'(1) For the purposes of a proceeding against a body corporate for an offence against a law of the Commonwealth not involving any fault element, being an offence;*

*(a) constituted by conduct of a director, servant or agent of the body corporate acting within the scope of his or her office, employment or engagement; and*

*(b) that is stated in terms that are capable of applying to the body corporate as well as to the director, servant or agent;*

*the conduct of the director, servant or agent and, where relevant, the state of mind of that person in relation to that conduct, are to be attributed to the body corporate,*

*(2) In relation to any other offence against a law of the Commonwealth subsection*

*(3) applies unless the law creating the offence indicates that subsection (4) is to apply*

*(3) For the purposes of a proceeding against a body corporate for an offence against a law of the Commonwealth:*

*(a) conduct engaged in by a controlling officer of the body corporate acting within the scope of his or her office, employment or engagement and, where relevant, the state of mind of that person in relation to that conduct, are to be attributed to the body corporate; and*

*(b) conduct engaged in by a director, servant or agent of the body corporate, acting within the scope of his or her office, employment or engagement and, where relevant, the state of mind of that person in relation to the conduct, are to be attributed to the body corporate if the body corporate failed to take measures that, in the circumstances, were appropriate to prevent, or reduce the likelihood of, the commission of the offence*

*(4) For the purposes of a proceeding against a body corporate for an offence against a law of the Commonwealth, conduct engaged in by a director, servant or agent of the body corporate acting within the scope of his or her office, employment or engagement and, where relevant, the state of mind of that person in relation to the conduct, are to be attributed to the body corporate*

*(5) Where a body corporate is charged with an offence against a law of the Commonwealth and subsection (4) applies for the purposes of a proceeding for the offence, it is a defence to the charge if the body corporate establishes that it had taken measures that in the circumstances, were appropriate to prevent, or reduce the likelihood of, the commission of the offence*

*(6) Notwithstanding the preceding provisions of this section, for the purposes of a proceeding against a body corporate for any offence against a body corporate for*

*any offence against a law of the Commonwealth, conduct by way of communication in relation to a matter engaged in by a person who is an authorised agent of the body corporate in relation to that matter and, where relevant, the state of mind of the agent in relation to that communication, are to be attributed to the body corporate.*

*(7) A reference in this section to a person acting within the scope of his or her office, employment or engagement in relation to a body corporate does not include a case where the person acts with the intention of doing harm, or concealing harm done by him or her or by another person, to the body corporate.'*<sup>56</sup>

Major criticisms of this scheme are that there is no organisational basis of fault; the *Natras* principle is retained in 4(3)(a); the communication basis of liability is capricious; and there is imprecision of the terms 'intention to harm' or 'conceal harm.' The Gibbs Committee's approach only has the merit of defining how liability might ensue. It offers clarity over the existing Scottish position but does not enshrine the sort of values and provisions I envisage for Scotland. A Scottish framework should move away from identification and also offer new provisions on the sanction of corporations. Fisse claims the Australian Ozone Protection Act 1989 has a better provision in section 65 which states that

*'(1) Where, in proceedings for an offence ..., it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show;*  
*(a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual employment or apparent authority;*  
*and*

*(b) the director, servant or agent had the state of mind*

*(2) Any conduct engaged in on behalf of the body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority shall be taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.'*<sup>57</sup>

Even this provision is not complete but Fisse suggests that it might act as exemplar, modification of which might produce the requisite conception of corporate fault. His variation would require that the external elements of the offence have been committed by a person for whose conduct the corporation is vicariously liable and the corporation would be at fault on the basis that it had a

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<sup>56</sup> See Fisse, 'Recent Developments In Corporate Criminal Law And Corporate Liability To Monetary Penalties 1990 13 University of New South Wales Law Journal 1-41 at p. 12-14

<sup>57</sup> See Fisse, n 56 at p. 14

policy that expressly, or impliedly, authorises or permits the commission of the offence or an offence of the same type; or by failing to take reasonable precautions or to exercise due precautions to prevent the commission of an offence or an offence of the same type; or by failing to have a policy or failing to comply with a reactive duty to take preventive measures in response to having committed the external features of the offence; or by failing to take reasonable precautions or to exercise due diligence to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence.<sup>58</sup> It is this variation that I have sought to develop into my own outline proposal below. I have excluded the notion of reactive corporate fault, explicit in Fisse's model for the reasons I have already stated in chapter 4.

In 1974 the new Texas Penal Code included some new provisions relative to corporate criminal liability

Section 7.22

*' (a) If conduct constituting an offense is performed by an agent acting in behalf of a corporation or association and within the scope of his office or employment, the corporation or association is criminally responsible for the offence defined*

*(1) In this code where corporations and associations are made subject thereto*

*(2) By law other than this code in which a legislative purpose to impose criminal responsibility on corporations or associations plainly appears; or*

*(3) By law other than this code for which strict liability is imposed, unless a legislative purpose not to impose criminal responsibility on corporations or associations plainly appears*

*(b) A corporation is criminally responsible for a felony offense only if its commission was authorized, requested, commanded, performed or recklessly tolerated by :*

*(1) a majority of the board of directors acting in behalf of the corporation or association; or*

*(2) a high managerial agent acting in behalf of the corporation or association and within the scope of his office or employment'*

This formulation suffers from the same problems as certain other attempts. The continued allegiance to liability deduced from corporate actors rather than the corporation is fallacious. It does, however, offer an indication as to how statute

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<sup>58</sup> See Fisse, n. 56 at pp. 14-15

might point to a retention of strict and vicarious liability statutory offences whilst at the same time activates accessibility to common law crimes.

Should there be consideration of the different types of corporations ? Should smaller companies face less onerous burdens than the larger corporations ? If an integral part of the social obligation is to privately police should the greater resources of the larger corporation be a factor ? There is undoubtedly difficulty in fault attribution on this basis. As Leigh argues 'the difficulty with formulating rules by reference to the characteristics of the corporations as these are reflected in company legislation is that the classifications generally relate to closeness of control by an ultimate person or group, and, therefore, contemplate dispersal of shareholding, rather than the varying sizes of companies or the diversity of their activities which are the key factors.'<sup>59</sup> According to Leigh, the size question should be best left to prosecutorial discretion.<sup>60</sup> My own preference is that it should have no bearing on the issue of liability but may have some bearing on the sanction imposed. What about the Crown or public corporations ? Should these be differentiated on the basis that punishment of a public body is merely a punishment on society or the State. What about the privatised utilities ? Again for egalitarian reasons, I cannot foresee any concession to public or quasi-public corporations.

One of the key issues in fault attribution identified by some commentators is whether a fixed model of attribution should be defeasible ?<sup>61</sup> Should it be possible for example to show that the shareholders disapproved of the directors actions or should it be the case that the executive organ having acted in such a way the company is liable irrespective of what the shareholders' views ? Should there be a defence whereby if an individual acted without the intention to benefit the corporation and perhaps an intention to harm the corporation, the corporation would not be liable ?<sup>62</sup> By adopting a corporate fault model of liability such a problem would not materialise. Emphasis would be on the corporation's actions,

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<sup>59</sup> Leigh, n. 53 at p. 289

<sup>60</sup> Leigh, n. 53 at p. 290

<sup>61</sup> Leigh, n. 53 at p. 292

<sup>62</sup> Leigh, n. 53 at p. 294



policies procedures and practices rather than the individual's actions and mental state. Reasonable application of precautions and due diligence would be the requisite defences.

Leigh claims that the issues of corporate criminal liability 'have never been squarely faced either by Parliament or by the courts. Perhaps it is better that they should not be. The common law rules concerning corporate liability represent a rough, and perhaps arbitrary, response to the enforcement problems posed by group activities and the characteristics of groups. It may be that any response must be a rough and in some measure arbitrary; perhaps fundamental problems about the functions of criminal law, the moral bases for the attribution of guilt and the like cannot be perfectly resolved. Certainly there seems no single neat solution to problems of corporate and group liability.'<sup>63</sup> Such an approach appears defeatist in attitude. There are tangible problems in attaching criminal liability to collectivities. The magnitude of the task should not however, deflect attempts at seeking solutions. It is true that corporate criminal liability does not fit a neat formulation. This should not however, constrain our willingness to attempt the unconventional. My own formulation is not imbued with neatness; it suggests liability for some 'true' crimes and statutory crimes, it recognises liability for individuals within the corporate form where the law currently permits that, and it envisages a more diversified strategy of sanctions than has hitherto been the case. Its hybrid amalgamation is conceded. Neatness of solution should not be our objective; rather we should seek a pragmatic, workable and ultimately sustainable system of corporate criminal liability. It is my view that our knowledge is sufficiently expansive now to develop such a system and confront what hitherto seemed an impossible task.

There is a view expressed in Anglo-American jurisprudence that there should be no distinction between 'regulatory' and 'true' crime and that we should attempt to universally apply criminal offences through one basis of fault. My own model rejects this as lacking in pragmatism. The Law Reform Commission of Canada's

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<sup>63</sup> Leigh, n. 53 at p. 298

principal approach was to differentiate real crimes from regulatory crimes.<sup>64</sup> They considered that real crimes had relativity to values whereas regulatory offences were more concerned with results. Leigh was critical of this; he saw part of the role of criminal law as that of moulding values and that many regulatory offences were major in their import and effect. Moreover, some regulatory offences were not bereft of moral fault and as such the distinction between regulatory offences and real crimes was not as stark as the Canadian Law Commission suggested.<sup>65</sup> The suggestion in Canada was that officers of corporations should be liable for real crimes where there is recklessness or intention and additionally there would be officer liability for regulatory offences on the basis of negligence. Leigh suggests that 'A clear articulation of a negligence standard in the case of regulatory offences might be of real value in helping to set general standards of care and skill for directors. It is entirely to be welcomed that the onus should lie on an accused to show that he exercised due diligence.'<sup>66</sup> The Canadian Law Commission adopted a doctrine of *prima facie* imputability and in the process abandoned the identification theory. They did not however seek to supplant corporate criminal liability with personal liability. In Canada the Law Commission concluded that the role of 'true' criminal law in controlling the activities of corporations was limited. Leigh referring to the application of the common criminal law to corporations argues that,

'It is difficult and expensive to enforce, and the lack of enforcement resources in the face of the sheer size of the problem leads to its being invoked at best only sporadically. Moreover, the courts are not suitable forums for re-organizing a corporation's structure or reforming its business practices. The criminal trial simply provides a medium through which selective responses can be made to proven deviant acts; it is not a regulatory device...Even if the criminal trial were not so limited a device some situations might well be too large or too politically charged to allow for adequate resolution through criminal law.'<sup>67</sup>

This is not a view with which I concur. I do concede the difficulties but the case for the attachment of corporate criminal liability is in my opinion, overwhelming. To then deny the application of developed common law crimes, appears on the face

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<sup>64</sup> Criminal Responsibility for Group Action *Working Paper No 16* (1976)

<sup>65</sup> Leigh, n. 53 at p. 298

<sup>66</sup> Leigh, n. 53 at p. 299

<sup>67</sup> Leigh, n. 53 at p. 302

of things to be 'tying one hand behind one's back.' Many of these existing crimes are both relevant and appropriate to the corporate form. Some are not, but that does not justify the abandonment wholesale of common law crimes.

Though not an integral part of this thesis, I also seek to lend support for the development of some criminal law offences premised on the creation of harm rather than the fortuity of consequence. In chapter 5 I have covered this area in some detail. Gobert succinctly states that 'fortuity has significant ramifications for the actor's criminal liability.'<sup>68</sup> Gobert seeks to address the problem engendered by criminal causation and concludes that 'it may well be that the most practical approach to questions of causation lies in the frank recognition that the true issue is not causation at all but attribution-whether, under all the circumstances, it is fair and just to attribute the harmful result to the defendant...the best way to reach this end point is not to manipulate notions of causation but to base liability forthrightly on acts and mental state, regardless of consequence.' Such a notion is not alien to any of the criminal law systems; it is to be found in certain offences (dangerous driving, perjury) and also in the law of attempts.<sup>69</sup> One can posit that such an approach is right given that both situations are equally morally blameworthy. There must of course be recognition that attempts are treated less strictly and that unlike in respect of substantive crimes the court may have a greater range of flexibility in the disposal.<sup>70</sup> Gobert offers the view that 'neither causation, attempt, nor sentencing is adequate to escape the fortuity of consequence.'<sup>71</sup> According to Gobert, 'What is needed is amore coherent approach, and the starting point may be to ask what it is that the criminal law is trying to accomplish.' Gobert asserts that two issues arise from the notion of moral blameworthiness; the first is that only those who are blameworthy should suffer criminal sanction; secondly punishment should bear a relationship to the actor's degree of moral fault. It follows that some conduct may result in harm which is not morally blameworthy and therefore

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<sup>68</sup> Gobert, '*The Fortuity Of Consequence*' 1993 3 Criminal Law Forum 1-46 at p. 3

<sup>69</sup> In respect of the latter in England section 4 of the Criminal Attempts Act 1981 permits punishment equal to that appropriate for the substantive crime. Gobert, n. 68 at p. 20

<sup>70</sup> Gobert, n. 68 at pp. 22-25

<sup>71</sup> Gobert, n. 68 at p. 25

beyond the criminal sanction. More importantly, moral blameworthiness may occur in conduct where no harm ensues. According to Gobert, 'passively to accept consequences as indicative of blameworthiness is to suspend critical judgment.'<sup>72</sup> What Gobert and others assert is that 'voluntary acts capable of inflicting harm on others- done with either the intent to cause that harm or reckless of the potential for that harm- are, absent excuse or justification, deserving of moral condemnation and criminal sanction without regard to the harm actually resulting. Crimes should be defined not in terms of result but in terms of acts and mental state. To do otherwise is to risk draining the law of its moral imperative.'<sup>73</sup> One of the consequences of Gobert's (and others) view of the criminal law is that some crimes may have to be redefined. One of the most obvious areas for reform would be that of criminal homicide which may be revised to include endangerment.<sup>74</sup> Gobert recognises that strict liability offences may need to be reconsidered. His approach is that if such conduct merits punishment without a *mens rea* requirement then such activity should simply be unlawful *per se* without the need for 'chance' result arising out of the activity.<sup>75</sup> Even in Gobert's utopia harm continues to be of significance. It will remain central to what is defined as a crime. The legislators/jurists 'must decide whether the potential for harm involved in a course of conduct is of sufficient

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<sup>72</sup> Gobert, n. 68 at p. 28

<sup>73</sup> Gobert, n. 68 at p. 29

<sup>74</sup> Such an approach was contemplated in New Zealand in the Crimes Bill of 1989 clause 130

"130 Endangering with intent to cause serious bodily harm

(1) Every person is liable to imprisonment for 14 years who-

(a) Does an act, or omits without lawful excuse to perform or observe any legal duty, with intent to cause serious bodily harm to any other person; or

(b) With reckless disregard for the safety of others, does any act, or omits without lawful excuse to perform or observe any legal duty, knowing that the act or omission is likely to cause serious bodily harm to any other person

(2) This section applies whether or not the act or omission results in death or bodily harm to any other person

132 Endangering with intent to injure etc.

(1) Every person is liable to imprisonment for 5 years who -

(a) Does any act, or omits without lawful excuse to perform or observe any legal duty, with intent to injure any other person; or

(b) With reckless disregard for the safety of others, or heedlessly, does any act, or omits without lawful excuse to perform or observe any legal duty, the act or omission being likely to cause injury to any person or to endanger the safety or health of any other person

(2) Every person is liable to imprisonment for two years who negligently does any act, or omits without lawful excuse to perform or observe any legal duty, the act or omission being likely to cause injury.' see Brown, 'Culpable Homicide, Endangerment And Aggravated Violence' 1989 NZ Recent L Rev 299; France, 'Reforming Criminal Law -New Zealand's 1989 Code' 1990 Crim L Rev 827

gravity and of sufficient likelihood that the creation of risk should warrant a criminal sanction...the inherent danger in a criminal law scheme that contains crimes of risk creation is over-criminalization.<sup>76</sup> Harm would be significant in determining the sentence, not necessarily just the resultant harm but the qualitative nature of the harm threatened, the likelihood of the harm occurring and the extent of the potential for harm.<sup>77</sup> Harm would also be a factor in the exercise of prosecutorial discretion and resultant harm would be significant as evidence. What about public reaction to such offences? Gobert fails to satisfactorily address this issue simply suggesting education and enlightenment as a solution to public ignorance. As attractive as such an answer may appear academically, the practical realities are somewhat different. According to Smith, a person's criminal liability should not depend on matters of chance or on events which do affect his dangerousness to society or his moral blameworthiness.<sup>78</sup> Smith does not support the idea that crime should become an entirely mental affair; there must be the criminal act.<sup>79</sup> Stephen supported differential punishment based on harm and thought it pedantic to call both instances (one where harm ensues and another where it does not) the same offence. He did so on the basis that 'it gratifies a natural public feeling to choose out for punishment the one who actually has caused great harm, and the effect in the way of preventing a repetition of the offence is much the same as if both were punished.'<sup>80</sup> Smith says we should only create a new criminal law where the need for one is proved.<sup>81</sup> In this case, there are strong reasons for supposing that the need is apparent.

In Australia there has recently been promulgated the Australian Criminal Code Act 1995.<sup>82</sup> The emphasis in Australia has been on developing strong corporate governance; the Code is an attempt to make governance of the corporation more

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<sup>75</sup> Gobert, n. 68 at p. 33

<sup>76</sup> Gobert, n. 68 at p. 35

<sup>77</sup> Gobert, n. 68 at p. 36

<sup>78</sup> J. C. Smith, 'The Element Of Chance In Criminal Liability' 1971 Criminal L. R. 63-75 at p. 63

<sup>79</sup> Smith, n. 78 at p. 69

<sup>80</sup> Quoted Smith, n. 78 at pp. 71-2.

<sup>81</sup> Smith, n. 78 at p. 73

<sup>82</sup> See A. Rose, '1995: Australian Criminal Code Act: Corporate Criminal Provisions' 1995 6 Criminal Law Forum at pp. 129-131



expansive developing as it does accountability to the wider community.<sup>83</sup> Unlike the Draft English Criminal Code Bill of 1989 it does not seek to restrict corporate criminal liability to offences punishable by fine. Specifically mentioned are crimes punishable by imprisonment.<sup>84</sup> The Australian Code Committee 'wanted to stress the importance of making corporations responsible for the acts of all their officers, even acts that involve offences against the person.'<sup>85</sup> Criminal liability will be ascribed to the corporation where the board of directors or other high managerial agent intentionally, knowingly or recklessly carried out the relevant conduct or where the corporate 'culture' encourages situations that lead to the commission of an offence. Companies will accordingly be responsible for their practices and policies. High managerial agent is someone with duties of such responsibility that his conduct may fairly assumed to represent the policy of the company.<sup>86</sup> It may occur in a specific individualised occasion where for that particular event the person was a high managerial agent. Acquiescence in particular practices may result in liability. The company may invoke the defence of due diligence where the infraction represents the actions of a high managerial agent but such a defence will not be available where the alleged offence arises from the actings or omissions of the board of directors.<sup>87</sup> The attribution of corporate criminal liability does not under the Act deflect from individual liability. The important new concept of 'corporate culture' is defined as attitude, policy, rule, course of conduct, or practice existing within the body corporate generally or in the part of the body corporate where the offence occurred.<sup>88</sup> Rose notes that it will also cover situations where the employee acts on implicit authorisation- either the act has been sanctioned previously or the employee has reasonable cause to believe it would be sanctioned.<sup>89</sup> The Code substantially redresses the deficiencies in *Natras*. It will as Rose contends 'catch situations where non-compliance was expected, despite documents appearing to require compliance. Corporate negligence is establishable against the corporation as an entirety. It may be established by the failure to ensure

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<sup>83</sup> Rose, n. 82 at p. 132

<sup>84</sup> Australian Criminal Code Act para 12.1 (2)

<sup>85</sup> Rose, n. 82 at p. 134

<sup>86</sup> Australian Criminal Code Act para 12.3 (6)

<sup>87</sup> Australian Criminal Code Act para 12.3(3)

<sup>88</sup> Australian Criminal Code Act para 12.3(6)

adequate organisational communications. If negligence cannot be attributed to an appropriate individual within the corporation the court may form a view of the corporation's conduct as a whole.<sup>90</sup> In essence this is done by aggregating the acts of the corporate actors together. Corporate negligence may also be exhibited where the prohibited conduct is substantially attributable to inadequate corporate management, control or supervision of the conduct of one or more employees, agents or officers.<sup>91</sup> Under the Code corporations may escape strict liability offences on the basis of due diligence, and that the corporate actor acted under a mistaken but reasonable belief of fact.<sup>92</sup> A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to inadequate corporate management, control or supervision of corporate actors or through the failure to provide adequate information systems.<sup>93</sup> What is interesting about this recent Australian formulation is the attempt to develop the idea of corporate blameworthiness through assessment of its 'culture.' What I argue for is the radical formulation of such an approach as a stand alone basis of corporate liability for common law crimes and statutory crime where no *mens rea* is specifically formulated, and not, as part of some wider articulation of the identification model through managerial failing or some other device.

Is it realistic to draw upon approaches in other countries to devise our own system? Davis claims 'Systems of criminal law are not available..through laboratory systems. We cannot even come close to laying two such systems side by side...we are not likely to get two systems with procedures or statutes with more than a family resemblance.'<sup>94</sup> Davis talks of the 'fallacy of omnipotent science' as being the 'vanity of intellect.'<sup>95</sup> For all that there are enough similarities to be able to predict with some certainty how well particular approaches may work within our own jurisdiction. Anderson argues that 'all the legal hurdles..are conceptual in

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<sup>89</sup> Rose, n. 82 at p. 135; Australian Criminal Code Act para 12.2(4)

<sup>90</sup> Australian Criminal Code Act para 12.4(2)

<sup>91</sup> Australian Criminal Code Act para 12.3(2)

<sup>92</sup> Australian Criminal Code Act para 12.5(1)

<sup>93</sup> Australian Criminal Code Act para 12.5(2)

<sup>94</sup> M. Davis, 'How To Make The Punishment Fit the Crime' in Pennock and Chapman (Eds.), *Criminal Justice*, (1985), at p. 126

<sup>95</sup> Davis, n. 94 at p. 126

nature, and while the law often becomes engrossed in the conceptual problems of legal history, such a focus tends to address more the interests of theoretical integrity rather than the interests of practicality.<sup>96</sup> History can teach us much, but any system must be practical and there can be no doubt that what is needed in Scotland is not intellectual theorising but practical solutions to an identified problem.

Need new laws be created or can existing laws be developed? Friedman argues for the utilisation of existing laws. He contends 'Laws that make use of the culture and draw on its strength can be tremendously effective. When a legal system contrives to cut with the grain it multiplies its strength.'<sup>97</sup> I have adopted this view in developing my own model. The pragmatist in me believes that by evolving and utilising as best we can our existing system the less likely it is that the new framework will meet extensive resistance. Of course, it is necessary to effect the best system; the purists would settle for nothing less. However, the search for the utopian ideal may not only ultimately prove elusive but, offer opponents of corporate criminal liability a device to filibuster change. In a spirit of realism we should take what we can now and search for utopia tomorrow. Fisse and Braithwaite have argued that it is important that the forces for change mobilise against those who prefer a continuing crisis.<sup>98</sup> They also contend that 'In the environment of growing crisis experimentation with new legal models becomes possible, and when experiments are seen to solve problems which paralysed the old law, then the new legal model may be institutionalised throughout the society and incorporated in fundamental legal structures.'<sup>99</sup> In the spirit of their promptings, and with some trepidation I offer the following outline proposition designed to embrace the features I have outlined throughout this thesis and which I believe to be consistent with the key lessons of Anglo-American jurisprudence.

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<sup>96</sup> D. S. Anderson, 'Corporate Homicide: The Stark Realities Of Artificial Beings And Legal Fictions' 1981 8 Pepperdine L. R. 367-417 at p. 404

<sup>97</sup> Friedman, *The Legal System: A Social Science Perspective* (1975), at p. 108

<sup>98</sup> Fisse and Braithwaite, 'Accountability And The Control Of Corporate Crime: Making The Buck Stop' in Findlay and Hogg (Eds.), *Understanding Crime and Criminal Justice*, (1988), at p. 120

<sup>99</sup> Fisse and Braithwaite, in Findlay and Hogg (Eds.), n. 98 at p. 119

## **Corporate Criminal Liability In Scotland - A Proposal**

### **1. Common law crimes**

(1) Notwithstanding any existing rule of the common law, and subject to the provisions of subsection 2, a body corporate will be liable for common law crimes from time to time recognised by the criminal law of Scotland.

(2) Irrespective of the provisions of subsection 1 of this section, a body corporate will not be liable, as a principal though they may be liable art and part, for the common law crimes of Scotland listed in Schedule 1 hereto.

(3) In determining the guilt or otherwise of a body corporate charged with a common law offence, the court will apply the conventional test of locating the *actus reus* of the offence. Any conduct engaged in or on behalf of the body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority shall be taken for the purposes of a prosecution to have been engaged in also by the body corporate. The body corporate shall only be criminally liable where, having due regard to its policies, procedures, practices, and systems the court considers that it has exhibited corporate fault.

(4) (1) A body corporate will be held to have exhibited corporate fault where

(a) its policies, or procedures, or practices, or systems ( or any combination thereof) are considered to have expressly or impliedly authorised or permitted the commission of an offence or,

(b) it has failed to take reasonable precautions or to exercise due diligence to prevent the commission of the offence

(2) For the avoidance of doubt it shall be a defence to any prosecution for a body corporate to establish that, having regard to all the circumstances, the body corporate took reasonable precautions and exercised due diligence to avoid the criminal act.

(5) Nothing in this section shall be taken to preclude the prosecution for a common law offence of any individual wrongdoer operating within the body corporate for conduct engaged in or on behalf of the body corporate. For the avoidance of doubt conventional rules of the common law criminal liability will apply to such prosecutions of the individual.

(6) Nothing in this section shall be taken to preclude the prosecution of both the body corporate and any individual wrongdoer jointly for any criminal offence arising from the same occurrence.

## **2 Statutory Crimes**

(1) No provision of this proposal, other than section 3 below, alters any existing or to be enacted rule of statutory criminal law. Bodies Corporate and their officers will remain liable under all existing provisions and those to be enacted henceforth

(2) For the avoidance of doubt, where any statutory enactment containing a crime capable of commission by a body corporate does not make clear provision of the requisite *mens rea* applicable to any crime within that statute, then the requisite mental element shall be corporate fault as defined in section 1 (4) above.

## **3 Punishment of Corporations**

In respect of all crimes, statutory or common law, unless the statute expressly provides otherwise, a court shall have the power to impose the following sanctions on a body corporate- a fine, dissolution of the company, forfeiture, a formal publicity sanction, community service, probation, a regulatory order compelling some restraint on behalf of the corporation or some restriction on its sphere of activity or operation, or any other sanction referred to in clause 7 of the Recommendation of the Council of Europe Committee of Ministers No R 88 / 18.(see Appendix A of this thesis)

## **Schedule 1**

### **List of those offences to be excluded from Section 1 of this Proposal**

Perjury

Rape

Bigamy

Incest

Clandestine Injury to Woman

Murder

Sodomy



Indecent Exposure (as part of shameless indecency)

Assault

Lewd and Libidinous Conduct

As I have argued, a new framework which sets down clear principles offers optimism that judicial and prosecutorial inertia and inconsistency can prove to be a phenomenon we only accord historical significance to. The outline proposal of corporate fault owes much to the concept of duty of care.<sup>100</sup> This should occasion little surprise. The desire to utilise the criminal law as a means of controlling corporations is not an exercise in semantics; it is of the very essence that corporations do have such a duty of care to the rest of society. They should have, what I describe elsewhere in this thesis as a social responsibility. The outline proposal does not fully flesh out the proposals on sanctions. The constraints of space dictate that this is not possible. Chapter 4 offers illustration as to how some of the proposals may be effected. The sub-thesis is that we need a more diversified strategy on sanctions and that the judiciary should be given greater discretion.

### **6.3 Conclusion- The Lessons From Anglo-American Jurisprudence**

Society finds itself in an ironic paradox where 'the technological advancement with its concomitant effect of inducing ever-increasing expectations, has simultaneously produced material affluence and environmental destruction and furthermore generated the leisure time that has resulted in an awareness of the value of the natural world and added to its burden of carrying man.'<sup>101</sup> It is a paradox which heightens our sense of awareness and at the same time increases the perils we face from corporate crime. The paradox implores us to take some action to ameliorate the consequences of our success. Despite the limitations of our empiricism,<sup>102</sup> we can nonetheless make several generalisations about corporate criminal liability some of which may attract universal support. These generalisations implore reconstruction of our law. As a basic starting point, we need to be relatively novel

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<sup>100</sup> Cf. Phillips 'Beyond The Limits Of Assault' 1995 SLT (News) 115 - 120

<sup>101</sup> Hundloe in P. R. Wilson and J. Braithwaite, *Two Faces Of Deviance: Crimes Of The Powerless And Powerful*, (1978) at p. 133

<sup>102</sup> Clinard, *Illegal Corporate Behaviour* (1979), at p. 229-230

in our approach without necessarily being revolutionary. Nor should there be any 'sacred cows' in developing an appropriate framework. One of our major problems has been that 'We often go on discussing problems in terms of old idea when the solution of the problem depends on getting rid of old idea, and putting in their place concepts more in accord with the present state of ideas and knowledge.'<sup>103</sup> We must be true to the adage that 'each age has to begin anew its legal thinking.'<sup>104</sup> As one writer has suggested 'We would base our legal decisions not on the facts of yesterday, but on the possibilities of tomorrow. We would seek the welfare of society in the principles we enunciate.'<sup>105</sup>

There is a need to educate the public about the problems of corporate crime on the basis that 'until there is a public sensibility that provokes moral outrage at this corporate indifference, the far reaching structural reforms that could make a major and lasting difference are unlikely to occur.'<sup>106</sup> Moreover, and as a concomitant to the above, it is necessary to develop stronger business ethics;<sup>107</sup> the failure of business ethics is the basis of much corporate crime.<sup>108</sup> Corporate failure to self-regulate necessitates government intervention but as we have seen in chapter 4 self-regulation remains an important dimension of strategy.<sup>109</sup> In arguing for a properly developed framework, the need to look beyond the criminal law is conceded.<sup>110</sup> Accordingly, the law needs not only be reformed but harmonised to marshal private policing with public policing. Corporate power must mean corporate responsibility<sup>111</sup> and, 'Corporations must realize that, as a long term proposition, what is good for society is also good for the corporation. They must put aside the purely economic basis on which they make many of their decisions and give

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<sup>103</sup> J. Dewey, 'The Historic Background Of Corporate Legal Personality' 1926 35 Yale L. J. 655-673 at p. 657

<sup>104</sup> H. J. Laski, 'The Basis Of Vicarious Liability', 1916 26 Yale L. J. 105-135 at p. 115

<sup>105</sup> Laski, n. 104 at p. 135

<sup>106</sup> S. L. Hills, *Corporate Violence: Injury and Death For Profit*, (1987) at p. 202

<sup>107</sup> M. Clinard, n. 102 at p. 214

<sup>108</sup> Clinard and Yeager, *Corporate Crime*, (1980) at p. 213 ff. Clinard suggests that development of business ethics may come from individual business entities and thereafter form trade organisations and associations and industry wide codes Clinard, n. 102 at p. 216

<sup>109</sup> Clinard and Yeager, n. 108 at p. 214

<sup>110</sup> Coffee, 'Beyond The Shut-Eyed Sentry: Toward A Theoretical View Of Corporate Misconduct And An Effective Legal Response' 1977 63 Virginia L. R. 1099 at p. 1276

<sup>111</sup> Laski, n. 104 at p. 133

something back to the Society that permits their existence. Failure to do so may lead to more dire consequences as society searches for a means to control corporate illegality.<sup>112</sup> Despite the historic perception of incorporation as public service, in the modern era, there is no legal reflection that the corporation has a positive obligation to serve the public at large. Indeed the corporation is simply held to a minimum standard of not violating the law.<sup>113</sup> Accordingly, there must be an aspiration on their part to extend beyond this minimalist position. I do not argue for stand alone self-regulation or any of the models of reactive fault suggested in chapter 4. As things stand society is along way from having the necessary element of trust such a system entails. The successful operation of a system of corporate criminal liability would seem a prerequisite foundation upon which ideas, including self policing, would operate. They are perhaps therefore concepts for tomorrow.

I have argued in chapter 2, and in this chapter, for liability to be based on corporate fault rather than anthropomorphic attribution through individual *mens rea* within the organisation. In surveying the literature it is apparent, as Wells argues, that 'cultural selection' dictates views of liability.<sup>114</sup> One of my own cultural 'selections' (outlined in chapter 3), like that of many commentators, is to reject the imperialism of methodological individualism in favour of a dual strategy of corporate liability and individual liability because,

'That ancient but tenacious individualism is in truth the coronation of anarchy; and the time comes when a spirit of community supersedes it.'<sup>115</sup>

'We have a legal system which is incapable of dealing with institutional violence because it is limited to holding individuals responsible for individual crime; and to a much lesser extent, to holding collectivities (mainly companies) responsible for collective crime. What we need is a legal system which places more emphasis on the latter, but which in addition, holds individuals responsible for individual crime. We need a

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<sup>112</sup> J. E. Stoner, 'Corporate Criminal Liability For Homicide: Can The Criminal Law Control Corporate Behaviour' 1985 38 South-Western L. J. 1275-1297 at p. 1296

<sup>113</sup> See Ermann and Lundman in Edelhertz and Overcast (Eds.), *White-Collar Crime - An Agenda For Research*, (1982) at p. 51

<sup>114</sup> Wells, 'Cry In The Dark Corporate Manslaughter And Cultural Meaning' in Loveland (Ed.), *Frontiers Of Criminality* (1995) at p. 15

<sup>115</sup> Laski, n. 104 at p. 134

legal order based less on neatly defined categories of guilt, and more on the dialectics of group and individual responsibility.<sup>116</sup>

There must also be a simple recognition of the international dimension of corporate crime.<sup>117</sup> According to Braithwaite, 'it is geocentrism which makes possible the international law-evasion strategies.'<sup>118</sup> It is apparent that the law has so far failed to recognise the impact of this internationalisation.<sup>119</sup> Any new system must seek international co-operation as part of the strategy to combat corporate crime but, as a first step Scotland needs to develop its own properly constituted domestic system of liability.

The issue of punishment has been fully addressed in chapter 4. For many commentators this has been a pragmatic reason for the rejection or limitation of corporate criminal liability. The issue of punishment is one which is easily dismissed on the basis that it is simply a logistical one; there are numerous options available to punish the errant corporation. With a little more imagination, we can travel beyond the limitations of fines and develop a multi-faceted penological system suited to the corporate form and not dominated by our understandings of individual punishment. It is necessary to devise and implement collective punishment in the same way as I have argued for collectivisation of liability. Ultimately,

'Challenging as the task of reconstruction is, hope should not be dashed by the ancient catchcry that corporations have neither bodies to kick or souls to damn. Presence or absence of these human features has little or no rational bearing upon the development of sanctions or concepts of fault in the corporate sphere. Indeed when kicks do need to be administered, a lack of sentient body and soul might come to be seen as an ideal condition for their infliction.'<sup>120</sup>

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<sup>116</sup> Wilson and Braithwaite, n. 101 at p. 250

<sup>117</sup> Braithwaite, *Corporate Crime In The Pharmaceutical Industry*, (1984) at p. 369

<sup>118</sup> Braithwaite, n. 117 at p. 373

<sup>119</sup> Braithwaite, 'Inegalitarian Consequences Of Egalitarian Reforms To Control Corporate Crime' 1980 Temple Law Review 1127-1145 at p. 1130

<sup>120</sup> Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault And Sanctions' 1982 56 South-Western California L. R. 1141 at p. 1246

In preparing any reforms it will naturally be necessary to pay heed to popular opinion<sup>121</sup> but, that will not be the primary driver. Importantly, 'we must be satisfied that this is the product of careful and principled choice rather than [just] tradition and happenstance.'<sup>122</sup> The approach will be one which engenders formalised State control but also one which unleashes the internal private policing mechanisms within the corporation itself. There is a fear that adoption of more formalised legal control simply permits the corporation to utilise its power to circumvent any new regime and that 'the paradox is that this very proliferation of law, regardless of its content, will tend to confirm existing inequalities. The more formal and complex the body of law becomes, the more it will operate in favour of formal, rational and bureaucratic groups such as corporations.'<sup>123</sup> However, this need not necessarily be so; by providing for a new scheme of corporate liability we will simply be focusing the law's energies against the corporate form. The collective power of corporations inevitably provides added power to them but not sufficient to threaten the whole apparatus of law that we require to be fixated by the corporate power of circumvention. Some will slip through the net of liability but, then some individuals slip through the net of criminal liability. It is an inevitable consequence of the criminal process. It will only become threatening at the point that large numbers of corporations are able to circumvent any system of criminal liability. It is therefore necessary that any system recognises problems identified elsewhere and attempts to avoid them.

It remains true that 'Legal culture is far more open textured and open to influence from any number of sources than is often supposed.'<sup>124</sup> Because of this we are able to draw upon material beyond the confines of the criminal law to develop a proper system to control a problematic topic. Reconstruction of corporate criminal liability will be difficult and must as a prelude contain an assessment of core values. It seems to me to be true that,

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<sup>121</sup> Ashworth, *Essays In Honour Of Sir J C Smith*, (1987) at p. 19

<sup>122</sup> Ashworth, n. 121 at p. 20

<sup>123</sup> Wilson and Braithwaite, n. 101 at p. 195

<sup>124</sup> Wells, 'Organisational Responses To The Risk Of Criminal Liability' 1995 Paper at p. 4



‘any attempt to reconstruct the criminal law has at face at least two basic problems :1 We have to make up our minds as to what we regard as the most important values in a reconstructed world;

2 We have to decide whether these values should be protected by the means at the disposal of the criminal law, or whether their protection should be left to the agencies of a different character.....

Each successive generation should realize the duty to work afresh its view on the problem of crime...instead of retaining unchanged, as a matter of course, the law inherited from its predecessors.’<sup>125</sup>

There are those who would sweep away all reference to corporate liability but such a view, in my opinion, has been largely discredited. It flies in the face of the clear shift in favour of developing corporate criminal liability. As a consequence, ‘Decriminalisation would be premature without considering what might be done to reconstruct criminal law in all aspects ...our efforts should be to rebuild, not dismantle corporate criminal law. In an area of law so obviously beset by uncertainty and delicate problems of balance such as this, legislatures tend to defer to the method of case by case judicial and administrative evolution.’<sup>126</sup> In developing a statutory framework we will be making a break with the abdication of the past. The judges that interpret and make the law and, the public that obey it, have a right to clear guidance as to what that law is and, how it is to be applied.

The law of corporate liability for offences stands at a cross-roads.<sup>127</sup> It might be going too far to say that at stake also is the capitalist system itself.<sup>128</sup> A borrowed approach may not on its own be enough or, indeed a valid approach. It certainly represents a useful starting point. An infusion of peculiarities to Scottish criminal law may be relevant but, all the while, it is important to recognise that corporate crime is a universal concept. What is called for is an imaginative co-ordination of a range of matters. The secret lies in blending what is possible, effective, and just.

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<sup>125</sup> Seney, ‘*The Sibyl At Cumae- Our Criminal Law’s Moral Obsolescence*’ 1971 17 Wayne Law Review 777-858 at p. 857

<sup>126</sup> Fisse, n. 120 at pp. 1244-5

<sup>127</sup> Colvin, ‘*Corporate Personality And Criminal Liability*’ 1995 6 Criminal Law Forum 1-44

<sup>128</sup> Clinard and Yeager, n. 110 at p. 325; Damage to system of capitalist system evident in comments of Judge J. Cullen Ganey in Electric Anti-Trust cases. In a pre sentence statement he said that the accused had “flagrantly mocked the image of that economic system of free enterprise which we profess to the country and destroyed the model which we offer today as a free world alternative to state control and eventual dictatorship (quoted in Donnelly, Goldstein and Schwartz, 1962, at p. 1087.)

Comparative legal analysis opens up countless options. In addition internal structures of the legal system must be plumbed.<sup>129</sup> The outline proposal *supra* seeks to do all of these things.

Corporations hold the future and will retain a central role in the twenty first century. There is simply no promising alternative way of organizing and carrying out most of the tasks of production.<sup>130</sup> It is therefore appropriate that there should be efforts to control their harmful capacity by applying criminal law to them. The modern capitalist system seeks to promote the corporate form as the optimum means of wealth creation. It is inevitable that there will be laws which favour and promote the interests of corporation ? Woods asserts that 'the corporate concept is a legal device. Rules for its use must be developed and applied. But such rules must not become the masters. No such device should be allowed to defeat the more important values of the law.'<sup>131</sup> We must convince corporations that crime is shameful and irresponsible.<sup>132</sup>

If one does accept the rationale for the application of the criminal law to corporations, inevitably one turns to the question of how best that can be achieved. Do we apply existing precepts and concepts to the corporate form, or is it necessary to develop a new framework of law particular to corporations ? According to Webster, 'White collar crime is prevalent enough, significant enough, and complex enough to compel a realignment of the thinking and methodology of the criminal justice system.'<sup>133</sup> That willingness to challenge the existing order of things is doubly important in the Scottish context. The Scottish 'tradition has revealed a relentless nostalgia. Legal practices have been fitted into a relentless vision of political and legal order that, ironically, owes a greater debt to the English common law than has ever been acknowledged. Many Scots lawyers are uncomfortable with questions of change or reform. The attitude we have uncovered is the belief

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<sup>129</sup> Clinard and Yeager, n.108 at p. 335

<sup>130</sup> Jacoby, *Corporate Power And Social Responsibility*, (1973) at p. 269

<sup>131</sup> Woods, n. 8 at p. 1194

<sup>132</sup> Fisse and Braithwaite, *Corporations, Crime And Accountability* (1993) at p. 221

<sup>133</sup> Webster, 'An Examination Of FBI Theory And Methodology Regarding White-Collar Crime Investigation And Prevention' 1980 17 American Criminal L. R275-287 at p. 286

that to meddle with the law is to invite disaster for, after all there have been no complaints about the way it works.’<sup>134</sup>

Whatever approach is taken, one is confronted with complexity, inconsistency and at times incoherence. Corporate criminal liability is not a concept imbued with simplicity. All the more reason why we should adopt a dynamic and diversified strategy to combat it.<sup>135</sup> Machiavelli claimed that ‘There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things.’<sup>136</sup> Whilst this is undoubtedly true, it is equally true that the ‘modern society is an open, adaptive, learning, innovative system’<sup>137</sup> and, in the words of Gabor, ‘Man cannot predict the future; he can invent it.’<sup>138</sup> We have the capacity to confront the problems and devise an appropriate system in the way that Anglo-American jurists have attempted to do so. It is their literature that is replete with ideas, some workable and some not. It is my view that Scots lawyers can learn much from these common law jurisdictions. Leigh believes that ‘there is a community of interest and a sufficient similarity among fundamental ideas for each system to learn from the other, and, from a European point of view, there is every reason to believe that we can achieve a useful measure of harmonization as well.’<sup>139</sup> However, as Levi notes that ‘The problem of international co-operation is not..a purely legal problem; it is also a problem of culture, attitudes and language- and of interests.’<sup>140</sup>

Important too, will be the gathering of more information about the nature and extent of corporate crime. Leigh has argued,

‘In the present state of criminological research we know enough to be sure that much further research is required. We do not know what number of offences are committed in the name of corporations. We do not know whether the large corporation is primarily responsible or whether

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<sup>134</sup> Farmer, n. 1 at p. 185

<sup>135</sup> Fisse and Braithwaite, n. 132 at p. 218

<sup>136</sup> The Prince 43, quoted in Brickey, ‘*Rethinking Corporate Liability Under The Model Penal Code*’ 1988 19 Rutgers L. R. 593-634 at p. 629

<sup>137</sup> Jacoby, n. 130 at p. 250

<sup>138</sup> ‘*Inventing The Future*’, (1969) quoted in Jacoby, n. 130 at p. 250

<sup>139</sup> Leigh, ‘*The Criminal Liability Of Corporations And Other Groups: A Comparative View*’ 1982 80 Michigan L. R. 1508-1529 at p. 1528

<sup>140</sup> Heidensohn and Farrell, *Crime in Europe*, (1991) at p. 175

difficulties arise primarily with respect to smaller firms, or whether there is any distinction worth drawing.<sup>141</sup>

Leigh naturally, was writing about the situation prevailing in jurisdictions other than Scotland. In Scotland no attempt has been made to gather any information about the corporate crime. One may suppose that therefor there is a flaw in my thesis in that before the law can be reformed one should know more about corporate crime within our own jurisdiction. I concede that it would be preferable to have such information but my contention is that we know enough about corporate crime both here and abroad to devise an effective system. Experience and empirical data may assist the process of refinement but should not preclude the introduction of a new framework.<sup>142</sup> The availability of such rich jurisprudence allows the debate to be informed and rationale. Though there are those like Pearce who believe that in 'analysing crimes of corporations we are ultimately led to ask fundamental questions about the nature of the world's 'free enterprise system',<sup>143</sup>, in my view, such analysis is now sterile. The discrediting and demise of the Soviet bloc has entrenched capitalism as the accepted credo of human existence. Doubtless capitalism will face future crises and may itself, in turn, become discredited but for the foreseeable future it is the system that will prevail. Corporations though seen as the vanguard of the capitalist system may well survive the demise of that system. The collective pooling of resources is not something which requires the adoption of a free-market philosophy. On any assessment, corporations are here to stay and consequentially corporate crime is a likely feature of their operation. If we are to control corporate wrongdoing, a pluralist approach is required. One which calls for a partnership between corporations themselves and the State.<sup>144</sup> We must evangelise corporations, the individuals who operate within them and, the wider public against the acceptability of corporate wrongdoing and we must attach liability where it is appropriate.<sup>145</sup>

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<sup>141</sup> Leigh, n. 8 at p. 135

<sup>142</sup> Note that Fisse and Braithwaite suggest that calls for empiricism are praxis. see n. 132 at p. 237

<sup>143</sup> Pearce, *Crimes Of The Powerful - Marxism, Crime And Deviance* (1976), at p. 105

<sup>144</sup> Levitske, 'Will The US Sentencing Commissions New Proposed Guidelines For Crimes By Organisations Provide An Effective Deterrent For Crimes Attributed To Corporations' 1991 29 Duquesne L. R. 782-802 at p. 802

<sup>145</sup> Fisse and Braithwaite, n. 132 at pp. 64-6

In concluding, it is imperative that one appreciates both the values and the perils of the corporate form. The call for the imposition of corporate criminal liability is not to be confused with anti-corporatism. In developing an effective workable system of corporate criminal liability,

‘we look to the corporate system to continue as a throbbing, but it is to be hoped uncongested, artery that will continue to route investment, labor and management services to the end results of ample productivity, full levels of employment, and equitable and efficacious distribution of economic rewards.’<sup>146</sup>

In striking the balance between control and emancipation we can learn much from the jurisprudence of the Anglo-American jurisdictions. They more than any other have grappled with the complexity that confronts us in corporate criminal liability. The solutions to the problem undoubtedly lie in the phalanx of literature which emanates from those countries. Isolation borne of deference to the supposed genius of our law is no longer tenable.<sup>147</sup> It is to the lessons of Anglo-American jurisprudence that we must look for the foundations of our new framework.

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<sup>146</sup> Timberg, *‘Corporate Fictions - Logical, Social And International Implications’* 1946 45 Columbia L. R. 533-580 at p. 580

<sup>147</sup> Farmer, n. 1 at p. 184



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## APPENDIX A

On the 20th October 1988 the Council of Europe Committee of Ministers adopted a Recommendation concerning liability of enterprises having legal personality for offences committed in the exercise of their activities.

*“Considering the increasing number of criminal offences committed in the exercise of the activities of enterprises which cause considerable damage to both individuals and the community*

*Considering the desirability of placing the responsibility where the benefit derived from the illegal activity is obtained*

*Considering the difficulty, due to the often complex management structure in an enterprise, of identifying the individuals responsible for the commission of an offence;*

*Considering the difficulty, rooted in the legal traditions of many European States, of rendering enterprises which are corporate bodies criminally liable;*

*Desirous of overcoming these difficulties, with a view to making enterprises as answerable, without exonerating from liability natural persons implicated in the offence, and to providing appropriate sanctions and measures to apply to enterprises, so to achieve the due punishment of illegal activities, the prevention of further offences and the reparation of the damage caused;*

*Considering the introduction in national law of the principle of criminal liability of enterprises having legal personality is not the only means of solving these difficulties and does not exclude the adoption of other solutions serving the same purpose;*

*Having regard to resolution (77) 28 on the contribution of criminal law to the protection of the environment, Recommendation No R (81) 12 on economic crime and Recommendation No R (82) 15 on the role of criminal law in consumer protection,*

*Recommends that the governments of the Member States be guided in their law and practice by the principles set out in the appendix to this recommendation.’*

*“The following recommendations are designed to promote measures for rendering enterprises liable for offences committed in the exercise of their activities, beyond existing regimes of civil liability of enterprises to which these recommendations apply.*

*They apply to enterprises whether they are public or private, provided they have legal personality and to the extent that they pursue economic activities.*

### ***1 Liability***

- 1. Enterprises should be able to be made liable for offences committed in exercise of their activities, even where the offence is alien to the purposes of the enterprise.*
- 2. The enterprise should be liable, whether a natural person who committed the acts or omissions constituting the offence can be identified or not*
- 3. To render enterprises liable, consideration should be given in particular to*

- a. applying criminal liability and sanctions to enterprises, where the nature of the offence, the degree of fault on the part of the enterprise, the consequences for society and the need to prevent further offences so require;
  - b. applying other systems of liability and sanctions, for instance those imposed by administrative authorities and subject to judicial control, in particular for illicit behaviour which does not require treating the offender as a criminal.
4. The enterprise should be exonerated from liability where its management is not implicated in the offence and has taken all the necessary steps to prevent its commission.
5. The imposition of liability upon the enterprise should not exonerate from liability a natural person implicated in the offence. In particular, persons performing managerial functions should be made liable for breaches of duties which conduce to the commission of an offence.

### **Sanctions**

6. In providing for the appropriate sanctions which might be imposed against enterprises, special attention should be paid to objectives other than punishment such as prevention of further offences and the reparation of damage suffered by victims of the offence.

7. Consideration should be given to the introduction of sanctions and measures particularly suited to apply to enterprises. These may include the following:

- warning, reprimand, recognisance;
- a decision declaratory of responsibility, but no sanction;
- fine or other pecuniary sanction;
- confiscation of property which was used in the commission of the offence or represents the gains derived from the illegal activity;
- prohibition of certain activities, in particular exclusions from doing business with public authorities;
- exclusion from fiscal advantages and subsidies;
- prohibition upon advertising goods or services;
- annulment of licences;
- removal of managers;
- appointment of a provisional caretaker management by the judicial authority;
- closure of the enterprise;
- winding-up of the enterprise;
- compensation and/or restitution to the victim;
- restoration of the former state;
- publication of the decision imposing a sanction or measure

These sanctions and measures may be taken alone or in combination, with or without suspensive effect, as main or as subsidiary orders.

8. When determining what sanctions or measures to apply in a given case, in particular those of a pecuniary nature, account should be taken of an economic benefit the enterprise derived from its illegal activities, to be assessed, where necessary, by estimation.

9. Where this is necessary for preventing the continuance of an offence or the commission of further offences, or for securing the enforcement of a sanction or

*measure, the competent authority should consider the application of interim measures.*

*10. To enable the competent authority to take its decision with the full knowledge of any sanctions or measures previously imposed against the enterprise, consideration should be given to their inclusion in the criminal records or to the establishment of a register in which all such sanctions or measures are recorded"*